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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER, PETITIONER,

vs.

LESLIE L. CONNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1961
CERTIORARI GRANTED JANUARY 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008 Civil

A. J. SIMLER, Plaintiff,

vs.

LESLIE L. CONNER, Defendant.

COMPLAINT—Filed April 24, 1958

Comes now the above named plaintiff and shows to this Honorable Court:

1. That he is a resident, citizen and inhabitant of the State of Arkansas residing in North Little Rock, Arkansas. That the defendant herein is a resident, citizen and inhabitant of Oklahoma County, State of Oklahoma, and that there is in controversy herein a sum in excess of $3,000.00, and by virtue thereof, this Court has jurisdiction herein.

2. This plaintiff further shows that this is an action for a declaratory judgment pursuant to 28 U.S.C. Art. 2201 for the purpose of determining questions of actual controversy between the parties as hereinafter more fully appears.

3. This plaintiff shows to this Honorable Court that heretofore and on or about the ..... day of July, 1952 this plaintiff herein employed the defendant, who is an attorney at law and who was at such time a duly licensed and practicing attorney, to represent this plaintiff in certain litigation in the contest of a will made by one, Birdine Fletcher, and in adjudicating the rights of this plaintiff in and to said estate, and that at such time this plaintiff and said defendant agreed that this plaintiff would pay to the said defendant a reasonable sum for his attorney's

fees in the handling of said matter for and on behalf of said plaintiff herein as his attorney.

[fol. 2] 4. That said attorney and this plaintiff conducted litigation concerning said matter through the Supreme Court of the State of Oklahoma on two different occasions and through the United States District Court at various times, with all of which the defendant is familiar, and in the United States Court of Appeals, Tenth Circuit, and the United States Supreme Court, and that said litigation has now been settled.

5. That the said defendant herein employed one, James E. Grigsby as an attorney to assist the said defendant and agreed to pay the said James E. Grigsby 28% of the attorney's fees which would be due to the said defendant as such attorney. That the said defendant, Leslie L. Conner, also employed Phil E. Daugherty, another attorney, to assist the said defendant in said litigation and agreed to pay said Phil E. Daugherty for his services out of such compensation as the defendant would be entitled to in said cause.

6. This plaintiff further shows to this Honorable Court that one, Arnold Britton, was associated with the said Leslie L. Conner in his office at such time and that the said Leslie L. Conner was liable to the said Arnold Britton, if anyone was liable to him for any fees to which Arnold Britton would be entitled to, but thi plaintiff shows that his contract of employment was with the said Leslie L. Conner.

7. This plaintiff shows that after said litigation had been carried on through the various courts, the said James E. Grigsby demanded an attorney's fee and filed suit in the United States District Court for the Western District of Oklahoma against this plaintiff and caused said property to be attached and oil runs withheld, and that this plaintiff was forced to and did employ John B. Ogden as his attorney to represent him in such matter and to represent him in other matters connected with said estate and protecting the rights of this plaintiff.

[fol. 3] 8. This plaintiff shows to this Honorable Court that he has paid out the following amounts as attorneys fees:

(a) The sum of $46,000.00 to Fred Suits, Mary Weiss and the firm of Dudley, Dudley & Dudley, which sum was paid on order of the County Court of Oklahoma County, Oklahoma, such sum being paid to said attorneys for representing the executor of said estate of Birdine Fletcher, deceased, who was the sister of this plaintiff.

(b) That in addition thereto, he has paid to Leslie L. Conner the sum of $24,000.00.

(c) That he has paid to James E. Grigsby, one of the attorneys employed by the said Leslie L. Conner, the sum of $12,800.00.

(d) That he has paid to John B. Ogden, the attorney employed by this plaintiff, the sum of $7,500.00.

That he has paid a total of $90,300.00 for attorney's fees.

9. This plaintiff now shows to this Honorable Court that the defendant, Leslie L. Conner, is claiming against this plaintiff additional attorney's fees in excess of $3,000.00, and that this plaintiff is entitled to have this Court determine said controversy between this plaintiff and the said Leslie L. Conner, and determine whether or not the said Leslie L. Conner is entitled to any additional fees, and if so, what amount.

Wherefore, this plaintiff prays that this Court adjudge whether or not this plaintiff is indebted to the defendant in any sum or sums whatsoever, and if so, to what extent or what amount, for costs of this action, and for such other and further relief as may appear to this Court just, right and proper in the premises.

John B. Ogden, Attorney for Plaintiff, 1408-9 Liberty Bank Building, Oklahoma City, Oklahoma.

DEMAND FOR JURY TRIAL

Comes now the above named plaintiff and hereby demands and requests a jury trial of this cause. Dated this the 24th day of April, 1958.

John B. Ogden, Attorney for Plaintiff.

[fol. 5] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008—Civil

[Title omitted]

AMENDMENT TO COMPLAINT—Filed August 18, 1958

Comes now the plaintiff and in compliance with the Order of this Court entered on August 1, 1958, wherein the Court sustained the defendant's motion for more definite statement, this plaintiff in compliance with the Order of the Court hereby amends the complaint filed herein, and shows that on or about the 18th day of July, 1952 the defendant was employed as alleged in paragraph 3 of the complaint, and that at said time and as evidence of said employment, Leslie L. Conner, the defendant herein, prepared in his office a letter dated July 18, 1952, which letter is in words and figures as follows, to-wit:

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: Birdine Fletcher Estate.
County Court Oklahoma County, Oklahoma.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court

reporters prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

[fol. 6] We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court, if the matter is successful either by trial or judgment or compromise.

If the matter is not won, compromised or settled you are not to charge us a fee.

Yours truly,

/s/ A. J. SIMLER,
A. J. Simler, for himself
and his children."

That although the defendant Leslie L. Conner did not sign said letter, he prepared the same and requested and directed the plaintiff herein to sign the same, thereby employing the said defendant as plaintiff's attorney and at that time the defendant Leslie L. Conner became and was the attorney of the plaintiff herein, A. J. Simler, and the relationship of attorney and client thereby and thereafter existed. That thereafter the said Leslie L. Conner did represent the said plaintiff in said matter therein referred to, and that the said Leslie L. Conner employed James E. Grigsby, the attorney mentioned in the complaint herein as pled in paragraph 5 of the original complaint, and also employed the said Phil E. Daugherty as heretofore pled.

Wherefore, plaintiff prays for judgment as in his original complaint set out herein.

John B. Ogden, Attorney for Plaintiff, 1408-9 Liberty Bank Building, Oklahoma City, Oklahoma.

Certificate of Service (omitted in printing).

[fol. 28] [File endorsement omitted]

[fol. 29]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Case No. 8008 Civil

[Title omitted]

ANSWER AND COUNTERCLAIM—Filed September 23, 1958

The defendant, Leslie L. Conner, for Answer to the Complaint and Amendment to the Complaint states:

—1—

The Complaint and Amendment fail to state a claim against Defendant upon which relief can be granted and Defendant moves the Court to dismiss the complaint.

—2—

Defendant admits the allegation in paragraph one of the Complaint.

—3—

Defendant denies the allegation contained in paragraph two of the Complaint.

—4—

As to paragraph three defendant admits that he is a lawyer, licensed to and has been admitted to practice of [fol. 30] law for the past thirty-three years and is admitted to practice before the Supreme Court of the United States: The Court of Appeals: Tenth Circuit: The Supreme Court of the State of Oklahoma and all Federal District Courts in Oklahoma and other bureaus and commissions.

Defendant, Leslie L. Conner admits that the Plaintiff, Mr. A. J. Simler, employed him on a written contingent fee contract, when Mr. A. J. Simler had been *"left $1.00 and no more"* in a Will signed by his sister, Birdine Fletcher. That defendant accepted such employment on a contingent fee contract, copies of which are attached hereto as exhibits of Leslie L. Conner, defendant, and Counterclaimant.

That Plaintiff and Defendant on September 25, 1952, because of other proposed litigation agreed on clarification of the word "reasonable fee" in said contingent fee contract of July 15, 1952. The litigation was continuous and was carried through the County Court, District Court and Supreme Court of Oklahoma; the Federal Courts in Oklahoma; and through the Court of Appeals, Tenth Circuit; and was three times appealed to the Supreme Court of the United States. During all this litigation Plaintiff was represented by this defendant, Leslie L. Conner, under his contingent fee agreement with plaintiff Mr. A. J. Simler, to be his lawyer in all this litigation and has ended by defendant, Leslie L. Conner, winning for Mr. A. J. Simler, the plaintiff a 160 acre oil producing farm with all minerals and mineral rights located in the Cement Field and described as:

> [fol. 31] NW¼ of Section 34 in Township 6 North Range 10 West of the I. M. in Caddo, County, Oklahoma.

which is producing oil at the rate of over $3500.00 per month as the landowners share.

—5—

Defendant admits the allegation contained in paragraph four of the Complaint and states in addition thereto that said litigation began in July 1952 with the Contest of the Will and ended in 1957 when Mr. A. J. Simler, plaintiff was paid over $65,635.09 in oil runs by W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased; which was recovered as a direct result of the legal services and judgments obtained in favor of Mr. A. J. Simler, the plaintiff and against the representative of his sisters estate.

—6—

As to paragraph five defendant admits that he employed two other attorneys to assist him in said cause and that one of them was Mr. James E. Grigsby on a 16⅔ contingent fee contract, payable out of the Fifty percent contingent fee contract signed by Mr. A. J. Simler, plaintiff,

herein, which was done with knowledge and the consent of the Plaintiff and later that contract was increased by defendant, Leslie L. Conner, from 16% to 28% and after working two years in the litigation the said Mr. James E. Grigsby quit and did not complete his agreement with this defendant but thereafter and in May, 1957, out of the [fol. 32] "oil runs" the said plaintiff was reimbursed for this payment to James E. Grigsby. Defendant employed Phil E. Daugherty to assist him in the case on a contingent fee agreement payable out of defendant's, Leslie L. Conner, fifty percent contract and he was worked continously in the case with this defendant.

—7—

As to paragraph six defendant admits that Mr. Arnold B. Britton was an employee in his office working for defendant on a salary and that the legal services he performed in the "Simler Cases", he performed as an employee of this defendant and he was paid for all his work therein prior to March 1956 when he voluntarily left the employment of this defendant.

—8—

As to paragraph seven defendant admits that James E. Grigsby filed suits in the District Court against Mr. A. J. Simler and this defendant, Leslie L. Conner, in an attempt to get his fee before the litigation was completed and that plaintiff, Mr. A. J. Simler, did settle with Mr. James E. Grigsby which settlement was made without the knowledge, consent or approval of this defendant.

—9—

As to paragraph eight defendant admits that plaintiff, Mr. A. J. Simler, after receiving over $65,639.09 as a direct result of over 5 years legal work of his attorney this defendant, Leslie L. Conner, he paid to defendant, Leslie L. Conner, $24,000.00 all as per written agreements [fol. 33] made between the parties copies of which are attached hereto, out of which defendant paid amounts to other attorneys who assisted him and for additional cost

that he had paid which left a part of the above sum for a part of his services. Defendant denies all other allegations of the Complaint.

ANSWER TO AMENDMENT TO COMPLAINT

For answer to the Amendment to the Complaint defendant states:

—1—

Defendant admits that the parties entered into a contract of employment as therein alleged and thereafter defined and clarified the meaning of the word "reasonable contingent fee" which was all agreeable and agreed to by Mr. A. J. Simler, this plaintiff and Leslie L. Conner, this defendant, that from July 1952, to the time the case was won and the property and farm was recovered Leslie L. Conner this defendant was the lawyer for the plaintiff, Mr. A. J. Simler.

—2—

Defendant denies that A. J. Simler, the plaintiff paid any sums to Mr. Fred Suits, Miss Mary Weiss, or Messrs. Dudley, Dudley and Dudley but alleges any sums so paid by Mr. W. H. Wilson the duly appointed, qualified and acting Executor (who was appointed by Birdine Fletcher, sister of the plaintiff) of the Last Will and Testament of Birdine Fletcher, deceased by County Court order in case No. 31726, as Estate expenses.

[fol. 34] —3—

Leslie L. Conner, defendant states that he has performed his contingent fee contract and he is demanding that Mr. A. J. Simler, the plaintiff perform his agreement and transfer to this defendant one-half of all sums and things of value recovered for him in this five year litigation all as agreed in writing between plaintiff and defendant in 1952 when plaintiff had been given *"$1.00 and no more"* in the Will of Birdine Fletcher and he employed plaintiff to try to obtain back from the "legatees named therein" the

amounts his sister had given them in her will. Defendant denies the other allegations in the Amendment to the Complaint.

Wherefore Defendant Leslie L. Conner, having fully answered the Complaint and Amendment prays that plaintiff Mr. A. J. Simler, take nothing by this action and that the Complaint be dismissed and he have the judgment and the relief prayed for in his Counterclaim.

[fol. 35]

COUNTERCLAIM OF DEFENDANT LESLIE L. CONNER

Leslie L. Conner, defendant, for cause of action in this Counterclaim against plaintiff, Mr. A. J. Simler, alleges and states:

—1—

Jurisdiction is founded on diversity of citizenship and amount. Plaintiff Mr. A. J. Simler is a citizen and resident of the State of Arkansas and defendant and Counterclaimant, Leslie L. Conner, is a citizen and resident of the State of Oklahoma and the amount in controversy exceeds the sum of Ten Thousand dollars exclusive of interest and costs.

—2—

That plaintiff employed defendant and Counterclaimant as his lawyer to represent him in a contingent fee attorneys contract on July 18, 1952, and later on September 25, 1952, plaintiff and defendant clarified the terms of that contingent fee contract by an agreement in writing providing for a scale of contingent fees to be paid defendant on the settling of the case, or trials or appeals thereof: That defendant and counterclaimant has performed his contract and plaintiff herein refuses to perform his agreement for division of the property recovered for him by this defendant and counterclaimant growing out of the litigation involving the following facts in the following cases and appeals, as shown by the allegation and the attached exhibits.

[fol. 36] —3—

That John W. Fletcher was the owner and in possession of the 160 acres farm and property described as NW ¼ of Section 34 in Township 6 North, Range 10 West of the I. M. in Caddo County, Oklahoma. He had married Birdine Simler, who was a sister of the plaintiff, A. J. Simler, and both now live in Oklahoma City, Oklahoma. Plaintiff lived in Arkansas and was the only heir at law of his sister, Birdine Fletcher. That the farm was producing oil and had been for many years, being located in the rich Cement Field of Caddo County, Oklahoma. That plaintiff, Mr. A. J. Simler, in an effort to obtain control of the 160 acre oil producing farm did on October 2, 1950, file a petition in the County Court of Oklahoma County, seeking to be appointed Guardian of Mrs. Birdine Fletcher, his sister and John W. Fletcher, his brother-in-law, (copies of his verified petition in Case No. 29063 County Court of Oklahoma are attached as Exhibits 1 and 2 as part of this Counterclaim). Upon hearing the Court appointed another Guardian and later Mr. John W. Fletcher died and Mrs. Fletcher, sister of plaintiff was restored to legal capacity and her Guardianship ended and she was appointed Administratrix of his Estate and as they had no children she inherited and took possession of the Caddo County farm.

—4—

Birdine Fletcher, sister of plaintiff then, had prepared and she signed her Last Will and Testament, dated July 9, [fol. 37] 1952, in which she made at least 19 bequests of money to others and in which she willed to the plaintiff Mr. A. J. Simler, her only remaining brother and sole and only heir at law the following:

> "I will and bequeath to my brother A. J. Simler of Little Rock, Arkansas, the sum of one ($1.00) this amount and no more."

all as shown by a copy of her will hereto attached and made a part hereof as Exhibit 3. Birdine Fletcher died on July 13, 1952, and on July 18, 1952, Mr. A. J. Simler employed Leslie L. Conner, as his Lawyer to represent on a con-

tingent fee contract to contest the Fletcher will and to prevent probate thereof. A copy of that agreement of July 18, 1952, is attached as Exhibit 4 and made a part hereof.

—5—

Thereafter on July 30, 1952, plaintiff directed the filing of the first contest and began a part of the litigation. Copy of that direction is attached as Exhibit 5.

—6—

Thereafter a new theory of law and procedure was discovered by defendant and counterclaimant, Leslie L. Conner and the proposed Federal Court litigation was discussed and by mutual agreement and for the mutual benefit of both parties, the plaintiff, Mr. A. J. Simler, and defendant and counterclaimant, Leslie L. Conner herein agreed in writing on September 25, 1952, on a clarification of the [fol. 38] meaning of the term "reasonable fee" as used in the agreement of July 18, 1952, said agreement of September 25, 1952 being as follows:

"Mr. Leslie L. Conner
Conner Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

Dear Sir:

With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,

/s/ A. J. SIMLER"

Copy of which is attached hereto as Exhibit 6 and made a part hereof.

—7—

The objections to the Probate of the Will of Birdine Fletcher, were prepared and filed in the County Court of Oklahoma County by defendant and counterclaimant in Case No. 31726 contesting the beneficiary Sisters of St. Francis, a corporation, who were to receive all of the Estate of Birdine Fletcher except a few thousand dollars bequests.

[fol. 39] —8—

Thereafter on October 14, 1952, after much preparation and research the Federal Court Litigation was authorized and directed by plaintiff and the defendant and counterclaimant as his attorney to file suit in the United States District Court for the Western District of Oklahoma in Case No. 5619 in order to attempt to obtain the real estate in Caddo County, Oklahoma, for plaintiff and for such other matters as the Court may determine, copy of plaintiffs written direction is attached as Exhibit 7. It was filed as Cause No. 5619: and styled A. J. Simler, plaintiff, vs. Sisters of St. Francis, a corporation, and W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased. The case was contested by those defendant and dismissed by the District Court. A copy of the Appearance Docket in case No. 5619 is attached hereto as Exhibit 8 and made a part hereof and a copy of the opinion of the Court dismissing the cause (110F (s) 761) is attached as Exhibit 9 and made a part hereof. Hereafter said matter was appealed as case No. 4656 to the Court of Appeals Tenth Circuit at Denver,

Colorado, briefed and orally argued and that Court entered a judgment reversing the trial court, a copy of that Opinion is attached as Exhibit 10 and made a part hereof and is recorded in 210 Federal (2) page 99. Appearance Docket in 4656 Court of Appeals is Exhibit No. 10A.

While this litigation was in process the County Court of Oklahoma County had entered an order in case No. 31726 admitting the will of Birdine Fletcher, deceased, to Probate and held the will valid and appointed W. H. Wilson [fol. 40] the person she named in her will as Executor thereof, and a copy of that order dated October 2, 1952, is attached hereto as Exhibit 11, and made a part hereof.

—9—

Thereafter Appeal was had in the will Case No. 31726 from the County Court to the District Court of Oklahoma County and the cause became No. 129158 and after much preparation and the testimony of over 50 witnesses used, taking many days trial, Judge Clarence Mills of the District Court, affirmed the County Court order admitting the Will to Probate copy of the Appearance Docket in that District Court appeal case is attached as Exhibit 12, and made a part hereof.

—10—

That after the appeal of Mr. A. J. Simler, to the District Court in the will litigation and after the filing of Case 5619 in the Federal Court the Executor, W. H. Wilson, and the Sisters and several of their lawyers filed an original action in the Supreme Court of Oklahoma against A. J. Simler as Case No. 36341 wherein they petitioned the Supreme Court to assume original jurisdiction of such a great and new question and to construe the statutes of the State of Oklahoma to assure them that the residuary beneficiary of the Fletcher will could take the real estate. This proceeding was vigorously contested briefed and orally argued and won, and the Court denied the Executor and the Sister's Petition and refused to take jurisdiction on February 2, 1954, copy of that Appearance Docket of the Supreme Court of Oklahoma is attached as Exhibit 13, and made a part hereof.

[fol. 41] —11—

Thereafter Case No. 129158 in the District Court which was 31726 in the County Court on the Will Contest was appealed for A. J. Simler, plaintiff herein by his attorney, counterclaimant, Leslie L. Conner, to the Supreme Court of the State of Oklahoma, and became cause No. 36075 in the Supreme Court. After diligent research and briefing and vigorous oral argument made therein the case was affirmed by the Supreme Court of Oklahoma which held the Will of Birdine Fletcher, sister of Mr. A. J. Simler, to be valid to pass title to all her property and denied the theories of the plaintiff that his sister Birdine Fletcher did not have testamentary capacity to make her will or and that she was under undue influence of the Sisters of St. Francis, a foreign corporation the principal beneficiaries under her will who had been operating St. Anthony's Hospital in Oklahoma City.

Copy of that opinion in No. 36075 in the Supreme Court of Oklahoma is attached as Exhibit 14 and made a part hereof. Copy of the Appearance Docket in the Supreme Court is attached as 14A.

—12—

That while the litigation and contest were proceeding both in the State and Federal Courts W. H. Wilson, the Executor of the estate of Birdine Fletcher, deceased, and the Sisters of St. Francis, a foreign corporation filed a petition for Certiorari ("Appeal") to the Supreme Court of the United States in Washington, D.C., from the [fol. 42] judgment of the Court of Appeals, Tenth Circuit from 210 F (2) 99 and it was necessary for defendant and counterclaimant, Leslie L. Conner, to resist the Petition which was successfully done and the Supreme Court of the United States denied Certiorari (the appeal) in Case No. 677 October 1953, term on (April 25, 1954) as shown by Exhibit 15 attached hereto and made a part hereof being reported in 347 U.S. 954 and 98 L. Ed. in 1099 and thereafter the Executor and the Sisters of St. Francis, filed a petition for Rehearing and Motion to Stay of Proceedings in the Supreme Court of the United States in the same case

which was also denied by the Supreme Court on May 24, 1954, 98 L. Ed. 113 copy of which is attached at Exhibit 16 and made a part hereof.

—13—

Thereafter that appeal case was returned from the Supreme Court to the Court of Appeals, Tenth Circuit and then to the Western District of Oklahoma, in Oklahoma City, and it was necessary to make application and obtain from the Federal District Court certain injunctions against W. H. Wilson the Executor and the Sisters and have judgment entered in Case 5619 which was done on June 14, 1954, copy of the judgment is attached as Exhibit 17, which was again appealed by Wilson and the Sisters to the Court of Appeals, Tenth Circuit, as Case No. 4961 and on Motion of Counterclaimant and for legal reasons the Court of Appeals dismissed their appeal.

[fol. 43] —14—

Thereafter in Case No. 5619 and on March 17, 1955, Injunctions was issued against Wilson and Sisters, copy attached as Exhibit 18.

—15—

Thereafter the said W. H. Wilson, Executor, of the estate of Birdine Fletcher, deceased, and the Sisters of St. Francis, a corporation, and their attorneys continued to claim the farm and right to possession and the oil runs and because of their claims and acts it was necessary to file Case No. 6352 in the Federal Court styled by Mr. A. J. Simler, plaintiff, against the Sisters of St. Francis, a corporation, seeking to quiet title in Mr. A. J. Simler to the 160 acre oil farm all as shown by the Appearance Docket being Exhibit 19 in the United States District Court for the Western District of Oklahoma.

—16—

Thereafter Mr. A. J. Simler, filed a complaint in the United States District Court, against Phillips Petroleum, a

corporation, for an accounting of the oil from the farm and to obtain the oil runs copy of the Appearance Docket in Case No. 6363 in that Court is attached as Exhibit 20.

—17—

Thereafter Mr. A. J. Simler, as plaintiff sued Phillips Petroleum Company to obtain later oil runs which they [fol. 44] refused to pay him, as shown by Appearance Docket in Case No. 6793 being Exhibit 21.

—18—

Appeals were had on case 6452 and 6363 and from other orders in 5619 to the Court of Appeals, Tenth Circuit and attached hereto are the copies of the Appearance Dockets of the Court of Appeals, Tenth Circuit the cases No. 5129 as Exhibit 22 Case No. 5130 as Exhibit 23 Case No. 5131 as Exhibit 24 attached as Exhibit 25 is the Injunction issued by the Court of Appeals, Tenth Circuit March 15, 1955 on Application of A. J. Simler, in Case No. 5102 in that Court against the Executor and Sisters.

—19—

After the entry of the additional judgments of the Circuit Court of Appeals W. H. Wilson, Executor of the estate of Mrs. Birdine Fletcher, and the Sisters of St. Francis, a corporation, who were defendant in these cases filed another Appeal to the Court of Appeals, Tenth Circuit and then to the Supreme Court of the United States asking Certiorari on a second Appeal from a judgment entered in 5619 which was denied on January 31, 1955, in Case 510 October Term 1954 Court as shown in 99 L. Ed. 728 copy of which is hereto attached Exhibit 26.

—20—

After the Court of Appeals, Tenth Circuit had entered judgments in the cases 5129, 5130, and 5131 without opinions directing the Executor and the Sisters of St. Francis, a corporation, among other things to divide the accumulated money and runs W. H. Wilson, Executor and

the Sisters of St. Francis, a corporation, again for the third time sought Certiorari on appeal to the Supreme Court [fol. 45] of the United States and the Executor and Sisters employed the John W. Davis law firm being Davis, Polk, Wardwell, Sunderland, and Kiendl, of New York City, a famous and outstanding New York law firm to represent them. This action was resisted by defendant and Counterclaimant, Leslie L. Conner but Certiorari was granted in Case 409 on November 14, 1955, and the judgments entered by the Court of Appeals, Tenth Circuit in Cases 5129, 5130 and 5131 were vacated and the matter returned to the Court of Appeals, Tenth Circuit, as shown by the opinion in 100 L. Ed. 785 also —— US —— copy of which is attached hereto as Exhibit 27 Petition for rehearing was filed by defendant and counterclaimant, Leslie L. Conner, but was denied in January, 1956. See Exhibit 28.

—21—

Thereafter the County Court of Oklahoma County entered its Final Order in Case 31726 allowing the Final Account of the Executor on December 9, 1954, and distributing to A. J. Simler the 160 acre oil farm but charging him with payment of all legacies, interest, taxes costs and the expenses (which in effect vacated the order) a copy of which is attached as Exhibit 29, which order was appealed for Mr. A. J. Simler by his attorney, Leslie L. Conner, the defendant and counterclaimant, to the District Court of Oklahoma County on December 15, 1954, and who presented to and heard by District Judge A. P. Van Meter who affirmed the order of the County Court copy of the Appearance Docket in Case No. 134859 District Court of Oklahoma attached as Exhibit 30.

[fol. 46] —22—

On Appeal to the Supreme Court of Oklahoma by defendant and counterclaimant, Leslie L. Conner, as Attorney for A. J. Simler these causes became No. 37365 in the Supreme Court and after diligent work planning, briefing, research and oral argument, the Supreme Court reversed that judgment in part, all as shown by a copy of the Ap-

pearance Docket in that case attached as Exhibit 31 which saved plaintiff, Mr. A. J. Simler, thousands of dollars all being reported 308 P (2) 304. Copy attached as Exhibit 32.

—23—

Thereafter Phillips Petroleum Company sued A. J. Simler and Wilson and Sisters for Interpleader on the oil runs it was holding as shown in copy of the Appearance Docket attached as Exhibit 33 being Federal District Court Case No. 7107.

—24—

Thereafter the estate of Birdine Fletcher was closed and W. H. Wilson, Executor of the Will and Estate of Birdine Fletcher was discharged all as shown by the Appearance Docket in Case No. 31726 attached here as Exhibit 34, and the property distributed and the plaintiff A. J. Simler obtained the farm and returns and the balance of the cash.

—25—

Thereafter the plaintiff and Counterclaimant this defendant entered into written agreements dated May 22, 1957, which are self explanatory and copies are attached as Exhibit 35 on Division of money and Exhibit 36 being [fol. 47] agreement that plaintiff would not sell, dispose of, transfer or encumber the farm described as:

> NW ¼ of Section 34, Township 6 North, Range 10 West in Caddo County, Oklahoma.

before settling with defendant for his services:

That all 36 Exhibits attached hereto are made a part of the Answer and Counterclaim as though herein repeated and set forth in full.

—26—

The agreements for division of recovered property between plaintiff, Mr. A. J. Simler, and defendant and counterclaimant, Leslie L. Conner, was on a 50% basis became of the extensive litigation and Appeals and has not been performed by plaintiff, Mr. A. J. Simler, although defen-

dant has worked as attorney for plaintiff for over 5 years and has performed his contract, obtained the farm and balance of the funds and plaintiff, Mr. A. J. Simler has refused to perform his agreement, now that recovery has been made and refuses to deliver to defendant, Leslie L. Conner, his attorney his one-half of the recovery.

—27—

Plaintiff, Mr. A. J. Simler, did not own or have any right, title or interest in and to the 160 acre farm heretofore described and his only hope of securing any interest therein was by the diligent, constant and effective efforts of an [fol. 48] attorney able and willing to prosecute his claim to a successful conclusion. The entire litigation involved in the contest of the will of Birdine Fletcher and the Federal Court Litigation to prevent the beneficiary from taking the property was both novel and extremely difficult. The plaintiff and contestant, Mr. A. J. Simler, was not a local citizen of this community (nor an established company) nor a regular client but was a resident of North Little Rock, Arkansas.

—28—

Employment and attempt to recover more than the "$1.00 and no more" which his sister willed him, in such case, was beset with legal disadvantages considering the fact that the principal defendant and the beneficiary, the Sisters of St. Francis, in his sisters will was a Catholic Religious Society and Sisters operating the largest hospital and other charities in Oklahoma and who had befriended and taken care of Birdine Fletcher, his sister, in her old age and sickness. The fact that his sister Birdine Fletcher preferred and willed all her property to Charity rather than give it to her brother this plaintiff, A. J. Simler. He had filed a Guardianship case against her in 1950 in an attempt during her lifetime to obtain possession of her property; in this action he failed.

—29—

Acceptance of employment in such a case involved many considerations. The employment was on a contingent fee

[fol. 49] contract, uncertain of compensation or return of expenses advanced or rent and salaries paid to employees and others and the investigation required and the amount of work involved and the daily cost of operating a law firm and office.

—30—

The litigation took an excessive amount of lawyers time, stenographers, briefs, conferences, letter writing, travel, research, arguments, telephone calls, and expense involved a great amount of thinking, planning investigation and constant work and effort all the time, on the part of the defendant and counterclaimant, Leslie L. Conner. It involved research writing and preparation of briefs and making of many legal arguments in the County Court, District Courts, and the Supreme Court and the Court of Appeals, Tenth Circuit; and the Supreme Court of the United States.

—31—

It also involved hours, days, weeks, and months and more than five years of work and labor. It took faith and perseverance in order to win the case and obtain for A. J. Simler, this plaintiff, more than the *"$1.00 and no more"* which his own sister, Birdine Fletcher, had left him in her will.

—32—

Defendant and counterclaimant alleges he has fully [fol. 50] performed his legal services and is entitled to his part of the recovery.

—33—

It was a contingent fee on a graduated scale made in 1952, when plaintiff had *"one dollar and no more"* which fifty percent or one-half contingent fee of whatever is recovered, after payment of expenses considering the amount involved, the number of cases and courts involved is the customary charge made by members of the Bar in this locality who practice law and try law suits and appeal cases in the State and Federal Courts and is the amount of

contingent attorneys fees allowed by the laws of the State of Oklahoma. It took skill and faith to conduct the litigation. The amount involved in this case was great. As a result of the skill, labor and legal services and the constant effort of this defendant and counterclaimant as the lawyer for the plaintiff, Mr. A. J. Simler, there was recovered the 160 acre oil producing farm with many oil wells and a share of the oil produced therefrom each month. Other wells are being drilled thereon and only the top oil sands have been produced and many feet of productive sands remain. It is very valuable and defendant and counterclaimant is entitled to be adjudged to be over one-half thereof.

Wherefore Leslie L. Conner, Defendant and counterclaimant prays this Court to enter judgment for him and against plaintiff as follows:

[fol. 51] 1. That this Court render a judgment in favor of Leslie L. Conner, defendant and counterclaimant herein and against the plaintiff, A. J. Simler, adjudging that defendant and counterclaimant, Leslie L. Conner having performed all these legal services on a contingent fee contract and agreement as attorney for A. J. Simler is entitled to, and adjudged to be, the owner of a one-half (½) undivided interest in all oil produced from the

> The Northwest Quarter (NW¼) of Section Thirty Four (34) in Township Six (6) North, Range Ten (10) West in Caddo County, Oklahoma.

since April 1, 1957, and that after deducting of all sums paid to Mr. James E. Grigsby and Mr. John B. Ogden to May 1957 and all courts costs and expenses spent by defendant and counterclaimant, Leslie L. Conner, and all expenses spent by plaintiff A. J. Simler, that the defendant and counterclaimant be adjudged to be owner of one-half of the net remainder of the sum of over $90,000.00 paid to plaintiff, A. J. Simler by the Executor in and since May 1957, less the amount paid at that time to defendant and counterclaimant by the plaintiff and,

2. That the Court enter judgment in favor of Leslie L. Conner, defendant and counterclaimant, and against A. J.

Simler, the plaintiff, adjudging that Leslie L. Conner, defendant, and counterclaimant has an attorneys lien on and entitled to judgment for and the owner of an undivided one-half (1/2) iterest in:

[fol. 52] The Northwest Quarter (NW1/4) of Section Thirty Four (34), Township Six (6) North, Range Ten (10) West in Caddo County, Oklahoma.

and said lien be foreclosed all as provided by law and plaintiff be directed to execute the proper and legal covevance of said one-half undivided interest in said land, and,

3. For such other further and different relief, legal or equitable, general or special, to which he may show himself entitled, including interest and costs.

Leslie L. Conner.

Certificate of Service (omitted in printing).

[fol. 66]

EXHIBIT 4 TO ANSWER AND COUNTERCLAIM

July 18, 1952.

Mr. Leslie L. Conner, Atty.,
410-414 Hightower bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: BIRDINE FLETCHER ESTATE
COUNTY COURT OKLAHOMA COUNTY, OKLAHOMA.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because

we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court; if the matter is successful either by trial or judgment or compromise.

If the matter is not, won, compromised or settled you are not to charge us a fee.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler, for himself
and his children.

[fol. 68]

EXHIBIT 6 TO ANSWER AND COUNTERCLAIM

September 25, 1952

Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

Dear Sir:—

With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

taxes

I understand that all expenses and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,

/s/ A. J. Simler
A. J. Simler

[fol. 69]

EXHIBIT 7 TO ANSWER AND COUNTERCLAIM

Oklahoma City, Oklahoma
October 14, 1952

Conner, Hilpirt and Britton
Attorneys and Counselors at Law
Hightower Building
Oklahoma City, Oklahoma

Gentlemen:—

This is your authority and direction to file an action in the United States District Court for the Western District of Oklahoma, brought by me as the Plaintiff against W. H. Wilson as Executor of the Estate of Birdine Fletcher, and Sisters of St. Francis, a foreign Corporation, in which action we are to sue to void the Will insofar as the Real Estate in Caddo County, Oklahoma, is concerned, and for such other matters as the Court may determine in Declaratory judgment.

Yours very truly,

/s/ A. J. Simler
A. J. Simler

[fol. 166]

EXHIBIT 29 TO ANSWER AND COUNTERCLAIM

[Stamp—FILED IN COUNTY COURT, OKLAHOMA COUNTY, OKLA., DEC 9 1954, CLIFF MYERS, Court Clerk, By /s/ E. McKINNOR, *Deputy.*]

IN THE COUNTY COURT IN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

No. 31,726

In the Matter of the Estate of

BIRDINE FLETCHER, Deceased.

ORDER ALLOWING FINAL ACCOUNT, DETERMINING HEIRS, AND FINAL DECREE OF DISTRIBUTION

. . . . . .

[fol. 169] IT IS FURTHER ORDERED That the total debts and expenses of administration, as allowed herein, except the balance of estate and income taxes, which cannot now be definitely determined, are $58,700.92; that the specific legacies provided in the will as hereinabove shown total $69,009.00, with interest on said legacies from July 13, 1953, to March 30, 1954.

IT IS FURTHER ORDERED That the farm in Caddo County herein described and the rents and royalties therefrom which have accrued since July 13, 1952, are subject to the payment of all debts, expenses of administration, including estate and income taxes, and all specific legacies, with interest to March 30, 1954. *It is the intention to distribute title to said farm in A. J. Simley, free and clear of all obligations of any nature whatsoever except as herein set out.*

IT IS FURTHER ORDERED That unless a final determination of the estate and income taxes due the state and

federal government can be made and all such amounts, with interest, paid prior to final distribution, the executor is authorized to reserve from the intestate property the sum of $25,000.00 from which to pay all such additional assessments. And upon the final payment of such taxes and interest, any amount of said sum remaining shall be paid to A. J. Simler, as the sole heir at law of decedent.

IT IS FURTHER ~~ORDERED, ADJUDGED AND DE~~CREED That said estate remaining on hand for distribution should be and is hereby distributed as follows:

To A. J. Simler, the following described real property:

Northwest Quarter of Section 34, Township 6 North, Range 10 West, in Caddo County, Oklahoma,

and all income therefrom from and after July 13, 1952, after payment of all debts, expenses of administration, including taxes, and all legacies with accrued interest.

Italicized material handwritten.

[fol. 202] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF THE STATE OF OKLAHOMA

No. 8008—Civil

[Title omitted]

MOTION TO STRIKE AND MOTION FOR A MORE DEFINITE STATEMENT—Filed October 15, 1958

Comes now the above named plaintiff and moves the Court to strike from the answer of the defendant all of the first paragraph of paragraph 4 with the exception of the following words:

"As to paragraph three defendant admits that he is a lawyer,"

the remaining portion of said paragraph being redundant, immaterial and prejudicial.

The plaintiff moves the Court to require the defendant to set out in the second paragraph of paragraph 4 of the answer what contract he relies upon and to elect and state what contract he relies on, and when he was employed, and to state the consideration, if any, for the alleged second contract mentioned or alleged therein.

The plaintiff moves the Court to strike from the third paragraph of paragraph 4 the following:

> "That Plaintiff and Defendant on September 25, 1952 because of other proposed litigation agreed on clarification of the word "reasonable fee" in said contingent fee contract of July 15, 1952."

And in case the Court shall decline to strike therefrom the above allegation, then this plaintiff moves the Court to require the defendant to set out the consideration for said letter or agreement and who ad sed, if anyone, the said plaintiff to sign said letter.

[fol. 203] The plaintiff moves the Court to strike from paragraph 6 the following:

> "payable out of the Fifty percent contingent fee contract signed by Mr. A. J. Simler,"

and to strike from said paragraph the following:

> "out of defendant's, Leslie L. Conner, fifty percent contract"

The plaintiff further moves the Court to require defendant to state who reimbursed the said A. J. Simler for the payment to James E. Grigsby.

The plaintiff further moves the Court to strike from paragraph 6 the following:

> "Defendant employed Phil E. Daugherty to assist him in the case on a contingent fee agreement payable out of defendant's, Leslie L. Conner, fifty percent contract and he was worked continuously in the case with this defendant."

This plaintiff shows that all of said matters are incompetent, irrelevant, redundant, prejudicial and immaterial, and said matters above pled are pled for the sole purpose of creating prejudice against this plaintiff and attempting to take advantage of this plaintiff, and that the so-called letter dated the 25th day of September, 1952 was and is under the allegations of the pleadings herein null and void and of no force and effect, and that the relationship, according to the pleadings herein, had been the relationship of attorney and client and had been established prior thereto and on or about July 15, 1952, and that the said Leslie L. Conner was then and there and thereafter the attorney for the plaintiff herein, and he could not make any contract which would inure to the benefit of the defendant and against the plaintiff after said time, and that any attempt to so do is void and of no force and effect, and this plaintiff therefore moves the Court to strike from said answer and the cross-complaint herein all reference of any kind, character or nature to said purported letter of September 25, 1952 referred to in the defendant's answer and cross-complaint for said reasons.

[fol. 204] This plaintiff moves the Court to require the defendant to allege what sum, if any, the said James E. Grigsby was entitled to as attorney in said cause and when the said Grigsby quit, referred to and mentioned by the defendant in paragraph 6.

This plaintiff moves the Court to require the defendant to state in connection with paragraph 8 of his answer whether or not the $12,800.00 paid by this plaintiff to James E. Grigsby was a reasonable sum for the services rendered by the said James E. Grigsby, and if not, what amount the said defendant contends was a reasonable sum, in order that this plaintiff may know whether or not there is any contest or controversy between plaintiff and defendant with reference to the payment to the said James E. Grigsby of $12,800.00 as plead in the complaint herein.

This plaintiff moves the Court to require the defendant to make paragraph 9 more definite and certain by setting out what amount the defendant paid to other attorneys and to what other attorneys he refers, and to set out additional cost that he had paid, and to set out the amount left

to the defendant for his services. This plaintiff specifically moves the Court to strike from paragraph 9 all reference to the following:

"all as per written agreements made between the parties copies of which are attached hereto,"

and in connection therewith, shows to this Honorable Court that the agreement was solely for the purpose of disbursing money without prejudice to the rights of either of the parties, and that said agreement specifically uses the following language:

"Whereas A. J. Simler and Leslie L. Conner have been unable to arrive at a settlement pertaining to Leslie L. Conner's attorney's fees for his legal services rendered as attorney for the said A. J. Simler.

"Now, Therefore, without prejudice to the claims, contentions or agreement of either Leslie L. Conner or A. J. Simler with reference to said attorney's fees, it is agreed as follows:

[fol. 205] "First. That this instrument and agreement shall in nowise be considered by any of the parties hereto as a construction of the agreement with reference to attorney's fees between Leslie L. Conner and A. J. Simler, And This Agreement Shall Not Be Offered As Evidence In Any Court By Either Of The Parties Hereto Or Any Other Person Or The Heirs, Executors, Assigns Or Administrators Of Any Of The Parties Hereto. It Is Understood Between The Parties That This Agreement Simply Is Made So That The Money Now On Hand And To Be Distributed Can Be Used In Part And As Hereinafter Set Out By The Parties Hereto."

This plaintiff shows to this Honorable Court in connection therewith, that the said defendant well knew that said agreement was incompetent, but that he is pleading the same for the purpose of prejudicing the rights of this plaintiff herein and in violation of his written agreement, and that the same should be stricken from the answer and cross-complaint filed herein by the defendant, and for the

further reason that the same does not in anywise tend to prove or disprove any of the issues in this cause.

Motion and Pleading With Reference to Answer to Amendment to Complaint

This plaintiff moves the Court to strike paragraph 1 of answer to amendment to complaint for the reason the same does not state any facts which are pertinent, material or relevant herein.

This plaintiff moves the Court to strike from said answer to amendment to complaint the following appearing in paragraph 3 thereof:

> "and he is demanding that Mr. A. J. Simler, the plaintiff perform his agreement and transfer to this defendant one-half of all sums and things of value recovered for him in this five year litigation all as agreed in writing between plaintiff and defendant in 1952 when plaintiff had been given '*$1.00, and no more*' in the Will of Birdine Fletcher and he employed plaintiff to try to obtain back from the 'legatees named therein' the amounts his sister had given them in her will."

In connection therewith, this plaintiff shows to this Honorable Court that the basis of the defendant's allegation is contained in said paragraph in the letter of September 25, [fol. 206] 1952, and that the same is void, and that said pleading in said paragraph is prejudicial, redundant and immaterial and should be stricken from said paragraph, and in case the Court shall decline to so strike, then and in that event, the Court is requested to require the defendant to make said paragraph more definite and certain by stating upon what he bases the allegations therein.

This plaintiff moves the Court to strike the prayer set forth on page 6 of the answer to amendment to complaint, or that the defendant be required to state upon what grounds he asks the Court to dismiss this action and upon what ground or reason he offers for denying the plaintiff anything whatsoever herein.

MOTIONS AND PLEADINGS TO COUNTERCLAIM OF DEFENDANT LESLIE L. CONNER

This plaintiff moves the Court to strike from paragraph 2 of said counterclaim the following:

> "and later on September 25, 1952, plaintiff and defendant clarified the terms of that contingent fee contract by an agreement in writing providing for a scale of contingent fees to be paid defendant on the settling of the case, or trials or appeals thereof: that defendant and counterclaimant has performed his contract and plaintiff herein refuses to perform his agreement for division of the property recovered for him by this defendant and counterclaimant growing out of the litigation involving the following facts in the following cases and appeals, as shown by the allegation and the attached exhibits."

In connection with the above, this plaintiff shows to this Honorable Court that said purported letter of September 25, 1952 is not a contract, was never signed by Leslie L. Conner, Leslie L. Conner did not agree to do anything in connection with said litigation, but that the said Leslie L. Conner prepared said so-called letter on September 25, 1952 and requested the said plaintiff to sign the same and the plaintiff refused, and thereafter the said defendant, Leslie L. Conner persuaded and coerced the said plaintiff to sign said letter, and that at that time the relationship [fol. 207] of attorney and client existed between the said Leslie L. Conner and the plaintiff herein by virtue of the employment as evidenced by letter of July 18, 1952 wherein the said Leslie L. Conner accepted said employment on the basis and solely upon the basis of a reasonable fee to be fixed by the Court, all as shown in the letter of July 18, 1952, and therefore, said letter of September 25, 1952 is null, void and of no force and effect whatsoever, and the same is prejudicial and does not prove or tend to prove any of the issues in this cause.

This plaintiff moves to strike all of paragraph 3 from said counterclaim of the defendant for the reason the same is wholly incompetent, irrelevant and immaterial and does not constitute a cause of action or a defense to a cause

of action and is prejudicial and does not prove or tend to prove any of the facts pertinent to a disposition or trial of this cause, and is only pled for the purpose of prejudicing the rights of this plaintiff.

This plaintiff also moves the Court to strike the attached exhibits 1 and 2 referring to the allegations of paragraph 3 above mentioned for the same reasons, namely that the same are incompetent, irrelevant, immaterial, redundant, prejudicial and do not tend to establish or prove any of the issues in this cause.

This plaintiff moves the Court to strike all of paragraph 6 from the counterclaim of the defendant for the reason that the same is prejudicial, incompetent, redundant and does not plead plead allegations sufficient to constitute a cause of action or a defense to the plaintiff's complaint, and for the further reason that the alleged agreement or letter of September 25, 1952 is null and void, and that at that time the relationship of attorney and client existed and had existed since the 18th day of July, 1952, and therefore, said purported letter is in all things void and of no force and effect.

The plaintiff moves the Court to require the defendant to set out as pled in paragraph 8 of his counterclaim, who prepared exhibit No. 7 and where the same was executed, and upon whose advice if any, it was executed.

[fol. 208] The plaintiff moves the Court to strike exhibit No. 8 referred to in paragraph 8, and exhibit No. 10 referred to therein, and exhibit No. 10A and exhibit No. 11, all referred to in paragraph 8, for the reason that the exhibits mentioned above are immaterial, and that it is an attempt upon the part of the defendant to plead cumbersome exhibits which constitute no part of the counterclaim, and which tend to be confusing and is an attempt to plead evidence and also an attempt to plead matters over which there is no controversy and is in violation of the Rules of Civil Procedure in that it does not state a short, brief and concise statement of the facts relied upon. In connection therewith, this plaintiff shows to this Honorable Court that the opinions and dockets of the courts are not competent, especially in view of the fact that there is no controversy as to the proceedings being had.

Plaintiff moves the Court to strike paragraph 9 of said counterclaim for the same reason, in that the dockets or appearance dockets are not competent evidence herein and do not constitute a cause of action or a defense to plaintiff's complaint and are wholly incompetent, irrelevant and immaterial.

The plaintiff moves the Court to strike exhibit 12, the same being a copy of the appearance docket of the District Court of Oklahoma County, Oklahoma.

The plaintiff moves the Court to strike exhibit 13 mentioned in paragraph 10, it being a copy of the appearance docket of the Supreme Court of the State of Oklahoma and a certain application filed in said Supreme Court asking the Court to take original jurisdiction.

The plaintiff moves the Court to strike exhibit 14 mentioned in paragraph 11 of the cross-complaint, same being the opinion of the Supreme Court in the case of A. J. Simler, plaintiff in error, wherein the Supreme Court affirmed the District Court, and also to strike exhibit 14A, same being a copy of the appearance docket in the Supreme Court in the last mentioned cause.

[fol. 209] The plaintiff moves the Court to strike from paragraph 12 the word, "Appeal", for the reason there was no appeal and merely a petition filed for certiorari in the Supreme Court of the United States as mentioned in said paragraph, and to strike exhibit 15 mentioned therein, which is purportedly the order of the Supreme Court denying said petition, and the words used are simply "Denied", and the same does not prove or disprove any of the controverted allegations herein.

The plaintiff moves to strike exhibit 16 for the same reason.

The plaintiff moves the Court to strike exhibit 17 mentioned in paragraph 13 of the cross-complaint for the same reason, the same purporting to be an order of the Court of Appeals, Tenth Circuit.

The plaintiff moves the Court to strike exhibit 18 mentioned in paragraph 14, to strike exhibit 19 mentioned in paragraph 15, to strike exhibit 20 mentioned in paragraph 16, exhibit 21 mentioned in paragraph 17, exhibit 22, 23 and 24 and 25 mentioned in paragraph 18, exhibit 26 men-

tioned in paragraph 19, exhibit 27 and 28 mentioned in paragraph 20, and to strike the following from paragraph 20:

> "Executor and Sisters employed the John W. Davis, law-firm being Davis, Polk, Wardwell, Sunderland, and Kiendl, of New York City, a famous and outstanding New York law firm to represent them."

for the reason the same is wholly incompetent, irrelevant, redundant, immaterial, prejudicial, and does not state a defense in this cause or a cause of action in favor of the defendant.

This plaintiff shows that all exhibits mentioned hereinabove showing or tending to show appearance dockets in various courts copy of opinions in various courts, are wholly immaterial for the reason there is no controversy, and for the further reason it is an attempt to plead evidence herein and is in direct violation of the Rules of Civil [fol. 210] Procedure and makes the pleading unnecessarily voluminous without serving any useful purpose, and the same would be confusing to the jury and is wholly incompetent and prejudicial to the rights of this plaintiff. This plaintiff in connection therewith, shows to this Honorable Court that the only question actually involved herein is: What is a reasonable fee for the services performed? That the defendant is entitled to show what services he performed, but it is wholly unnecessary to plead herein the opinions, appearance dockets and exhibits heretofore mentioned in his cross-complaint herein.

This plaintiff moves to strike Exhibit 29 and 30 mentioned in paragraph 21 for the same reasons as mentioned above, exhibit 31 mentioned in paragraph 22, exhibit 33 mentioned in paragraph 23, exhibit 34 mentioned in paragraph 24, for the reasons herein mentioned above.

The plaintiff most respectfully moves the Court to strike exhibit 36 for the reason that the same was executed in connection with an attempt to compromise the matter before the Court, and for the further reason the same does not prove or disprove or tend to prove or disprove any of the issues in this cause.

This plaintiff further specifically moves the Court to strike exhibit 35 for the reason that the same was entered into between the parties solely for the purpose of attempting to compromise and that said agreement so states that the same was entered into without prejudice to the claims, contentions or agreement of either Leslie L. Conner or A. J. Simler with reference to said attorney's fees; and that said exhibit 35 further uses the following language:

> "That this instrument and agreement shall in nowise be considered by any of the parties hereto as a construction of the agreement with reference to attorney's fees between Leslie L. Conner and A. J. Simler, and this agreement shall not be offered as evidence in any [fol. 211] court by either of the parties hereto or any other person or the heirs, executors, assigns or administrators of any of the parties hereto. It is understood between the parties that this agreement simply is made so that the money now on hand and to be distributed can be used in part and as hereinafter set out by the parties hereto."

This plaintiff moves the Court to strike paragraph 26 of the cross-complaint for the reason that under the pleadings herein the defendant was only entitled to a reasonable fee, and there is no legal basis pled by the defendant to support the conclusions and allegations set forth in paragraph 26.

This plaintiff moves the Court to strike the following from paragraph 27:

> "and the Federal Court Litigation to prevent the beneficiary from taking the property was both novel and extremely difficult. The plaintiff and contestant, Mr. A. J. Simler, was not a local citizen of this community (nor an established company) nor a regular client but was a resident of North Little Rock, Arkansas."

This plaintiff shows that the residence of the plaintiff should not, did not and could not have any effect upon the proceedings, and that this plaintiff was proceeding upon the law and not upon persuasion or local preferment, and therefore, said allegations are wholly immaterial.

This plaintiff moves the Court to strike from paragraph 28 the following:

> "considering the fact that the principal defendant and the beneficiary, the Sisters of St. Francis, in his sisters will was a Catholic Religious Society and Sisters operating the largest hospital and other charaties in Oklahoma and who had befriended and taken care of Birdine Fletcher, his sister, in her old age and sickness. The fact that his sister Birdine Fletcher preferred, and willed all her property to Charity rather than give it to her borther this plaintiff, A. J. Simler. Hehad filed a Guardianship case against her in 1950 in an attempt during her lifetime to obtain possession of her property, in this action he failed."

for the reason that the same is incompetent, irrelevant, immaterial, prejudicial and does not prove or tend to prove any of the issues in this case, and therefore should be stricken from the cross-complaint.

[fol. 212] This plaintiff moves the Court to strike paragraph 29 for the reason the same is wholly incompetent, redundant, prejudicial and does not plead or tend to plead a cause of action or a defense as to the issues involved herein, and in case the Court shall decline to strike the same, then this plaintiff moves the Court to require the defendant to detail and attach an itemized statement or statements showing the expenses advanced or rent or salaries paid to employees and others and the investigation required and the amount of work involved and the daily cost of operating a law firm and office, and what other income he had and what other cases he had other than the one involved or the litigation mentioned in the pleadings in this cause, and as a reason for making such last mentioned motion, this plaintiff shows that in said paragraph the defendant uses the following:

> "Acceptance of employment in such a case involved many consideration. The employment was on a contingent fee contract, uncertain of compensation or return of expenses advanced or rent and salaries paid to employees and others and the investigation required

and the amount of work involved and the daily cost of operating a law firm and office."

This plaintiff moves the Court to require the defendant to state whether there was a law firm employed or only Leslie L. Conner, and if there was a law firm employed to state the members thereof and the contract of the partnership.

The plaintiff moves the Court to strike all of paragraph 30 from the cross-complaint for the reason the same is incompetent, redundant, cumulative, prejudicial, immaterial and does not constitute a cause of action or defense to the cause of action or petition, and in case the Court shall decline to so strike, then to require the defendant to itemize the expenses, amount of thinking, the amount of work in hours, days or weeks, and the time mentioned therein set out in either days, weeks, months or some manner, rather than general conclusions as pled therein.

[fol. 213] The plaintiff moves the Court to strike paragraph 31 for the same reason, and in case the Court shall decline to strike, then to require the defendant to itemize the number of hours, days weeks, and months mentioned therein.

This plaintiff moves the Court to strike all of paragraph 33, and in case the Court shall decline to strike all of paragraph 33, then this plaintiff specifically moves this Court to strike the following from said paragraph:

> "It was a contingent fee on a graduated scale made in 1952, when plaintiff had *'one dollar and no more'* which fifty percent or one-half contingent fee of whatever is recovered, after payment of expenses considering the amount involved, the number of cases and courts involved is the customary charge made by members of the Bar in this locality who practice law and try law suits and appeal cases in the State and Federal Courts and is the amount of contingent attorneys fees allowed by the laws of the State of Oklahoma."

In case the Court shall decline to strike said quotation from paragraph 33 above, then the plaintiff moves the Court to require the defendant to state whether he is relying upon

what is an ordinary reasonable fee, or relying upon any contract between the parties hereto, and in case the defendant states that he is relying upon a contract, being a letter dated September 25, 1952, then to strike the same from the pleadings herein for the reasons hereto set out in this motion. This plaintiff moves the Court to strike the following from said paragraph:

> "It took skill and faith to conduct the litigation. The amount involved in this case was great. As a result of the skill, labor and legal services and the constant effort of this defendants and counterclaimant as the lawyer for the plaintiff, Mr. A. J. Simler, there was recovered the 160 acre oil producing farm with many oil wells and a share of the oil produced therefrom each month. Other wells are being drilled thereon and only the top oil sands have been produced and many feet of productive sands remain. It is very valuable and defendant and counterclaimant is entitled to be adjudged to be over one-half thereof."

In case the Court shall decline to strike from said cross-complaint the above, then and in that event, the plaintiff moves the Court to require the defendant to state what amount was involved, instead of using the term: "The [fol. 214] amount involved in this case was great." The plaintiff also moves the Court to require the defendant to set out what other wells are being drilled thereon, and to state what other sands will be produced and what he means by the term: "only the top oil sands have been produced and many feet of productive sands remain." The plaintiff moves the Court to require the defendant to set out what other sands remain and what sands he refers to as "top sands". This plaintiff moves the Court to require the defendant to set out what he means by the term "it is very valuable", and to set out such term in money. The plaintiff moves the Court specifically to strike the following from said paragraph:

> "defendant and counterclaimant is entitled to be adjudged to be over one-half thereof."

The plaintiff moves the Court to strike the following from the prayer of the counterclaim:

"and adjudged to be, the owner of a one-half ($\frac{1}{2}$) undivided interest in all oil produced from the

The Northwest Quarter (NW$\frac{1}{4}$) of Section Thirty Four (34) in Township Six (6) North, Range Ten (10) West in Caddo County, Oklahoma.

since April 1, 1957, and that after deducing of all sums paid to Mr. James E. Grigsby and Mr. John B. Ogden to May 1957 and all courts costs and expenses spent by defendant and counterclaimant, Leslie L. Conner, and all expenses spent by plaintiff A. J. Simler, that the defendant and counterclaimant be adjudged to be owner of one-half of the net remainder of the sum of over $90,000.00 paid to plaintiff, A. J. Simler by the Executor in and since May, 1957, less the amount paid at that time to defendant and counterclaimant"

for the reason that said allegations in paragraph 1 of the prayer are not supported by any legal or proper allegations or exhibits which would authorize the rendition of such judgment.

This plaintiff moves the Court to strike all of paragraph 2 of the prayer of said cross-complaint appearing on pages 23 and 24 of said cross-complaint for the reason that there is no legal or proper pleading authorizing or warranting the rendition of such judgment prayed for, namely a one-half interest in the property of this plaintiff.

[fol. 215]

Conclusion of Motion

In conclusion of the Motion, this plaintiff shows to this Honorable Court that there is only one issue involved in this lawsuit, and that is: What is a reasonable fee for the services performed, and that this motion should be sustained for the reason that the pleadings show, and this Motion calls to the Court's attention the fact that the defendant has attempted to inject into this cause issues foreign to the actual issues involved.

Wherefore, this plaintiff moves the Court to sustain this motion.

Respectfully submitted,

/s/ John B. Ogden, Attorney for Plaintiff, 1408-9 Liberty Bank Building, Oklahoma City, Oklahoma.

Certificate of service (omitted in printing).

[fol. 243] [File endorsement omitted]

[fol. 244]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008 Civil

[Title omitted]

REPLY TO COUNTERCLAIM OF DEFENDANT

Filed May 14, 1959

Comes now the above named plaintiff and for his reply to the Counterclaim set forth in Paragraphs 1 through 23, inclusive, and 1 to 3 in the prayer of the Counterclaim, and says:

1.

This plaintiff specifically denies that he entered into an agreement on September 25, 1952 for the purpose of clarifying the terms of the contingent fee contract entered into on July 18, 1952 between the plaintiff and the defendant, Leslie L. Conner

2.

This plaintiff shows to this Honorable Court that the true facts with reference to the letter dated September 25, 1952 and referred to in Paragraph 2 of the Counterclaim are as follows.

3.

This plaintiff shows that heretofore and on or about July 18, 1952, he was introduced to the defendant, Leslie L. Conner and the plaintiff had not prior thereto known the said Leslie L. Conner and that on said date the plaintiff and defendant discussed employment by the plaintiff of the said [fol. 245] defendant to represent this plaintiff as his attorney in a certain will contest case then filed and pending or about to be filed in the County Court of Oklahoma County, Oklahoma, involving the will of plaintiff's deceased sister, Birdine Fletcher. That at the time of the death of Birdine Fletcher she owned real property in Oklahoma City, Oklahoma, personal property, bonds, notes and securities and the real estate consisted of a farm located in Caddo County, Oklahoma and described in the Counterclaim of the defendant herein.

4.

This plaintiff now shows that after a conference with the said Leslie L. Conner, he signed a letter of employment prepared by the said defendant and dated July 18, 1952, which letter of employment or copy thereof is pled in the Counterclaim on file herein and in which and by the terms of which the said Leslie L. Conner was to receive for his services a reasonable fee and this plaintiff was to pay the cost of the litigation which might or would thereafter ensue, all as more fully appears from a copy of said letter pled herein, and which said letter of employment is in words and figures as follows, to-wit:

"July 18, 1952.

Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: Birdine Fletcher Estate
County Court
Oklahoma County, Oklahoma

This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine

Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her."

[fol. 246] "We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler, for himself
and his children"

5.

This plaintiff now shows to this Honorable Court that after the execution of said letter by the plaintiff, the relationship of attorney and client then existed and that the said defendant then became the attorney for the plaintiff and began representing the said plaintiff as his attorney in connection with the said estate or will contest.

6.

This plaintiff shows that thereafter, the said Leslie L. Conner, defendant in this cause, prepared a will for the said plaintiff by the terms of which the said Leslie L.

Conner was appointed attorney for the Estate of A. J. Simler, plaintiff, and the said plaintiff at that tiime had great confidence in the said attorney, Leslie L. Conner, and on or about the 25th day of September, or shortly prior thereto the defendant Leslie L. Conner called the plaintiff [fol. 247] by telephone and asked him to come to the office of the said Leslie L. Conner and advised him that he should come down in connection with re-writing the will of the said A. J. Simler and did not mention any change or modification or clarificatoin of the contract of employment of July 18, 1952. The said plaintiff went alone to the office of Leslie L. Conner, and believing at the time that he was going there for the purpose of some matter in connection with the changing of his will at the suggestion of the said Leslie L. Conner.

7.

This plaintiff shows to this Honorable Court that at that time the offices where Leslie L. Conner officed had on the door and on their stationery "Conner, Hilpirt and Britton", and that he assumed by virtue thereof that it was a law firm and also by virtue of the fact that the letter of July 18, 1952 prepared by Leslie L. Conner uses this language in part: "This confirms our employment of yourself and law firm • • •."

8.

This plaintiff shows that when he arrived at the office of Leslie L. Conner, after a visitation, the defendant suggested that he take the plaintiff to lunch and plaintiff and defendant went to a cafe where beer was served and the defendant herein suggested to the plaintiff that he drink some beer and have lunch which the plaintiff did. Then, after lunch, the plaintiff and defendant, at defendant's suggestion, returned to the law office of the defendant and in the private office of the defendant, Arnold B. Britton, an associate or employee of Leslie L. Conner and Leslie L. [fol. 248] Conner then proceeded to insist upon the plaintiff herein signing the letter dated September 25, 1952 and at that time this plaintiff had no advice other than the advice and admonition given him by his attorneys, Leslie L.

Conner and Arnold B. Britton. That, at that time, the said Leslie L. Conner and Arnold B. Britton told the plaintiff that if he would sign the said letter, they would win for him everything in the estate and annul the will of Birdine Fletcher, and the said plaintiff herein argued with said attorneys and told them that he was willing for them to have a reasonable fee as provided in his letter of July 18, 1952, but that the said attorneys, namely, Leslie L. Conner and Arnold B. Britton continued to harass, harangue and argue with this plaintiff and coerced him and told him that it was to his best interest to sign said second letter on the 25th day of September, 1952.

9.

This plaintiff shows to this Honorable Court that at that time, he was past 74 years of age, had not had experience in litigation, had no way of knowing what was reasonable perceptage-wise or otherwise in connection with the employment of attorneys and knowing that he had already employed said attorneys for a reasonable fee, he continued to resist the demands, arguments, requests and advice of his lawyers to sign said contract or letter of September 25, 1952. This plaintiff further shows that he was worried over said litigation and greatly disturbed and had no one present with whom he could counsel and was not given an opportunity to seek outside or independent advice or counsel. Plaintiff shows that at that time he had great confidence [fol. 249] in the said Leslie L. Conner and that the said Leslie L. Conner knew that this plaintiff was without advice or knowledge concerning said matter and continually and consistently insisted upon the said A. J. Simler signing said letter. This plaintiff further shows that at such time and on said date this plaintiff executed a will prepared by the said Leslie L. Conner in which will the said Leslie L. Conner inserted the following paragraph in Article 9 thereof:

> "I direct that the executor employ my attorney Mr. Leslie L. Conner, 410-415 Hightower Building, Oklahoma City, Oklahoma, as the sole and only attorney for my estate."

10.

This plaintiff further shows to this Honorable Court that he had advised Mr. Conner, the defendant, that he did not wish to have anyone present with him when he executed his will and that the said Leslie L. Conner knew on said occasion that none of the relatives or friends of the said plaintiff were with him or would be with him and it was agreed that he should come to the office alone on said date, nainely, September 25, 1952. This plaintiff further shows that the witnesses to the said execution of said will were as follows: "Ruth Mayhew, Oklahoma City, Oklahoma", who was secretary to Leslie L. Conner, and "Arnold B. Britton, Oklahoma City, Oklahoma", who was either an associate, partner or employee of the said Leslie L. Conner, and "Leslie L. Conner, Oklahoma City, Oklahoma."

11.

That at said time the said Leslie L. Conner had already prepared before the plaintiff appeared in said office, the [fol. 250] letter of September 25, 1952, and that said letter was not the idea, expression or will of this plaintiff, but constituted a prepared instrument by the said Leslie L. Conner before he had even talked to this plaintiff and that the day of the month was blank on said letter and the word *"September"*, then *"——"* *"1952"* was at the end or beginning of said letter. That the said defendant inserted with a pen the figures "25" in said date of the letter. This plaintiff shows to this Honorable Court that said letter did not express a free and mutual consent or a free consent upon the part of the said plaintiff, A. J. Simler. That this plaintiff had no way of knowing, to begin with, what was a reasonable fee, and the letter of July 18, 1952 constituted the contract of employment and there was no consideration whatsoever between the parties for the execution of the letter of September 25, 1952.

12.

This plaintiff further shows that Leslie L. Conner did not sign the said second letter or first letter and did not agree to do anything in the second letter that he was not

bound to do by virtue of the first letter. And, there was absolutely no consideration of any kind, character, nature or description for the execution of the letter of September 25, 1952.

13.

This plaintiff shows to this Honorable Court that the said Leslie L. Conner is a lawyer of many years practice, is a graduate of the University of Oklahoma, licensed by the Supreme Court of Oklahoma, United States Court of [fol. 251] Appeals, Tenth Circuit, United States District Court for the Western District of Oklahoma, and the Supreme Court of the United States, and that this plaintiff only has an Eighth Grade education, was old, worried and disturbed and without advice on said occasion except the advice of the said Leslie L. Conner, and Arnold B. Britton, and that said defendant, Leslie L. Conner took advantage of his client in securing said letter and over-persuaded the said plaintiff to sign the said letter in the private, closed office of the said Leslie L. Conner, and the same did not constitute the will or desire of the said plaintiff, A. J. Simler, but was only the will and desire or expressed only the will and desire of the lawyer who prepared said letter, namely, Leslie L. Conner.

14.

This plaintiff further shows that by virtue thereof said letter is void and void for the further reason that said letter was made and prepared for the benefit of the lawyer and to his advantage and is therefore void and of no force and effect because of the fact that the relationship of attorney and client then existed and the plaintiff had great confidence and respect for the said Leslie L. Conner and his opinion and advice and accepted the same solely in the signing of this letter over his actual protest.

15.

This plaintiff further shows to this Honorable Court that the said Leslie L. Conner is estopped to rely upon said letter or plead the same or receive any benefits by [fol. 252] virtue thereof, and that the said Leslie L. Conner;

in procuring the signature of the said A. J. Simler on said letter, acted fraudulently and in bad faith and was guilty of actual fraud under the circumstances hereinabove shown; and by virtue of such fraud, said letter is void and of no force and effect.

16.

That in addition to the above, this plaintiff shows to this Honorable Court that the circumstances as hereinabove pled under which said letter was signed also show that the defendant was guilty of constructive fraud in the preparation of said letter and securing the signature of the said A. J. Simler thereon and thereto without any advice whatever to the said plaintiff except the advice of Leslie L. Conner and Arnold B. Britton, and by virtue of all the above, the said letter is absolutely void and of no force and effect and the defendant is not entitled to any benefits by virtue thereof or to claim any benefits or interest of any kind by virtue of said letter of September 25, 1952.

17.

This plaintiff shows to this Honorable Court that he always has been willing to pay to the defendant a reasonable attorney fee for his services and that plaintiff, up to this time, has paid to the said defendant Leslie L. Conner, the sum of $24,000.00, and that he believes the same to be reasonable under the circumstances in view of the other sums and circumstances which will hereinafter be set out, but that this plaintiff is not versed in the law and does not know actually what is a reasonable fee and did not know on September 25, 1952 and therefore, he must of necessity, rely [fol. 253] upon the same to be determined in this Court as to whether or not the $24,000.00 heretofore paid is reasonable compensation to the said Leslie L. Conner for his services rendered in said litigation.

18.

This plaintiff specifically denies the allegations in Paragraph 6 of the Cross Complaint and denies that the letter of September 25, 1952 was mutually agreed upon between

the parties, but alleges the true facts to be concerning said letter as hereinabove set out, and alleges and shows that said letter of September 25, 1952 is void and of no force and effect.

19.

This plaintiff further shows that the said will contest, mentioned in Paragraph 7 was lost and the will admitted to probate in the County Court of Oklahoma County, Oklahoma, and on appeal to the District Court, the protest was denied and the will was there admitted to probate and the cause was appealed to the Supreme Court of the State of Oklahoma and again the will was admitted to probate and after the Petition for Rehearing in the cause, the opinion became final. That on or about the 16th day of October, 1952, there was filed in the United States District Court, under Case No. 5619 a case styled "A. J. Simler versus W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased and The Sisters of St. Francis, a Corporation", asking for a Declaratory Judgment and asking the court, in effect, to declare that the Sisters of St. Francis, a Corporation, could not own or hold real property outside of an [fol. 254] incorporated city or town and to forbid the corporation from attempting to hold the farm formerly owned by Birdine Fletcher in Caddo County, Oklahoma, for the reason that the farm was not reasonably necessary or proper for carrying on the business for which the corporation of "The Sisters of St. Francis" was chartered or licensed and, therefore, the property having been willed to the "Sisters of St. Francis" could not be received by such corporation, and that the plaintiff herein, being the brother of the deceased Birdine Fletcher, was entitled to inherit the said property, and that the defendant in that case filed a Motion to Dismiss Summary Judgment and the same was sustained and the cause was dismissed and appealed to the United States Court of Appeals of the Tenth Circuit, under Case Number 4656, styled "Simler versus Wilson, et al.", cited as 210 Fed. 2d Page 99; and said cause was reversed and judgment was entered in favor of the plaintiff in that cause, who is the plaintiff in this cause, A. J. Simler.

20.

That in said cause in the United States Court of Appeals James E. Grigsby appeared and argued said cause and Leslie L. Conner, Charles W. Conner, Arnold B. Britton and Phil E. Daugherty of Oklahoma City, Oklahoma, were with him on the Brief for the Appellant and said Court held, in effect, that the provisions of the Oklahoma Constitution related to ownership of realty by corporations and provisions of business corporations act of Oklahoma relating to the same subject must be construed together and as so construed they forbid a corporation to take, acquire hold or own realty outside of cities and towns and additions thereto ex- [fol. 255] cept where reasonably necessary and proper for carrying on business for which the corporation was chartered or licensed and such provisions are prohibitory and not merely regulative, citing Oklahoma Constitution, Article 22, Section 2, 18 Oklahoma Statutes 1951, Article 1.30.

21.

This plaintiff now shows to this Honorable Court that after said opinion was rendered by said Court, the appellees therein filed a Petition for Writ of Certiorari in the Supreme Court of the United States, which was by that court denied and said judgment became final.

22.

This plaintiff shows to this Honorable Court that it was not absolutely necessary to raise such question or file such suit in the United States District Court and that the same could have been litigated in the state court without the necessity of going into the United States District Court, and that at the time of the death of Birdine Fletcher by virtue of the laws of the State of Oklahoma and constitutional provisions hereinabove set forth, this plaintiff became immediately the owner of said real estate situated in Caddo County, Oklahoma and the Circuit Court of Appeals of the Tenth Circuit in said opinion mentioned used the following language, in part:

"And the land not being legally and effectively devised, no title vested in the devisees. Instead, title immedi-

ately passed under the law of descent and vested in the appellant as the sole heir at law of the decedent."

23.

This plaintiff admits that a suit was filed in the Su- [fol. 256] preme Court, as alleged in Paragraph 10 of the Cross Complaint and as reflected by Exhibit 12, and as heretofore pled, the plaintiff admits that the Supreme Court of the United States denied certiorari as shown by Exhibit 16, and that Exhibit 17 mentioned in Paragraph 13 of the Cross Complaint, reflects the ruling of the Court in said cause. That a suit was filed as alleged in Paragraphs 15, 16, 17, 18 and 19, and that the exhibits attached to the Cross Complaint reflecting said proceedings are true and correct copies of what they purport.

24.

That certiorari was denied as reflected by Exhibit 20, in the Supreme Court of the United States, and that Court merely used the word "denied" with no opinion or argument thereon.

25.

This plaintiff admits the allegations with reference to the Petition for Certiorari alleged in Paragraph 20, but does not know how famous the lawyers mentioned therein are, but alleges the true facts to be that whatever their fame may be or have been, that he was required to pay them for their services in presenting said case in the Su- preme Court of the United States, together with Fred E. Suits and John B. or J. B. Dudley of Oklahoma City, Oklahoma, and that in all of said litigation mentioned, this plaintiff was required to pay the attorneys opposing him who represented the estate and the Sisters of St. Francis, and that the defendant in this cause did not appear and argue said matter orally in the Supreme Court of the United [fol. 257] States, but merely filed a brief and response, and that the opinion mentioned in Paragraph 20 by the Supreme Court of the United States, was rendered without oral argument and merely upon the briefs, and no person was

required to make a trip to Washington, D. C. in connection therewith. The opinion of the Supreme Court of the United States is, in words and figures as follows, to-wit:

"The Petition for Writ of Certiorari is granted. The judgment of the Court of Appeals is vacated and the judgment of the District Court reinstated."

26.

This plaintiff shows that he was required to pay the attorneys who secured said opinion which included Porter R. Chandler and Davis, Polk, Wardwell, Sunderland and Kiendl, all of New York City, and Fred E. Suits and J. B. Dudley, both of Oklahoma City, Oklahoma for the petitioners.

27.

The plaintiff admits the proceedings mentioned in Paragraph 21 and that the case was appealed to the Supreme Court of the State of Oklahoma, and is cited in 308 Pac. 2d, Page 304, as shown by Exhibit 32 attached to the defendant's Cross Complaint.

28.

This plaintiff admits that proceedings were had as shown and pled in Paragraph 23 of the Cross Complaint, as reflected by Exhibit 33 and Paragraph 24 of Exhibit 34, with reference to Paragraph 25 of the Cross Complaint.

29.

This plaintiff shows to this Honorable Court that on or [fol. 258] about May 22, 1957, the plaintiff and defendant entered into said agreement merely for the purpose of compromising or disbursing money with the strict agreement that the same would not be used and that said agreement would in no wise be used either for or against either of the parties, and that said agreement provides, among other things:

"Now, therefore, without prejudice to the claims, contentions or agreement of either Leslie L. Conner or

A. J. Simler with reference to said attorney's fees, it is agreed as follows:

First. That this instrument and agreement shall in no wise be considered by any of the parties hereto as a construction of the agreement with reference to attorney's fees between Leslie L. Conner and A. J. Simler, and this agreement shall not be offered as evidence in any court by either of the parties hereto or any other person or the heirs, executors, assigns or administrators of any of the parties hereto. It is understood between the parties that this agreement simply is made so that the money now on hand can be used in pa[illegible] and as hereinafter set out by the parties hereto".

Said exhibit being attached to the defendant's Cross Complaint as Number 35 and was made with the strict understanding and upon the honor and integrity of the parties herein involved that the same would neither be used in any shape, form or fashion by either of the parties in any litigation.

30.

This plaintiff shows that the said Leslie L. Conner has breached said agreement by attaching the same thereto as Exhibit 35 and pleading the same in this cause and attempting to gain advantage over this plaintiff, and that said exhibit should be stricken and not exhibited by the Court and that said agreement further provided, in part, as follows, and on Page 2 thereof, all future oil payments from the aforesaid described land shall be paid to A. J. Simler.

[fol. 259]

31.

This plaintiff further shows that the said Leslie L. Conner breached that part of said agreement by causing all oil runs to be tied up or held by the Phillips Petroleum Company, and that said funds have been accumulating on account thereof and that this plaintiff has not been permitted to receive said runs which are justly, legally, and rightfully his, and that the said plaintiff herein, A. J. Simler, has suffered great loss thereby.

31.

This plaintiff shows that the statutes of the State of Oklahoma provide that neither party can use against the other any statement in an effort to compromise any matter and for such reason said exhibit is wholly incompetent and should not be considered by this Court in determining this matter.

32.

This plaintiff specifically denies that the defendant was on a 50% basis as alleged in Paragraph 26 of his Cross Complaint and specifically denies that the defendant is entitled to 50% or any other percentage of the property of this plaintiff and alleges and states that the only sum to which the defendant is entitled is a reasonable attorneys fee and that the defendant should not attempt to claim an unreasonable fee, but that the defendant is attemping to take advantage of this plaintiff and collect an unreasonable fee and take the property which belongs to this plaintiff and which became his property upon the death of his sister, Birdine Fletcher.

33.

This plaintiff, with reference to Paragraph [illegible] of the [fol. 260] Cross Complaint, denies that he did not own or have any right, title and interest in and to the 160-acre farm described, but that he became the sole owner thereof upon the death of his sister, and that the question presented to the Court of Appeals, Tenth Circuit, as reflected by 210 Fed 2d. Page 99, Simler v. Wilson, was not a difficult question, but was a simple question of the fact that the corporation under the Constitution and Laws of Oklahoma, could not take, acquire, hold or own realty outside of cities and towns and additions thereto except where reasonably necessary and proper for carrying on business for which the corporation was chartered or licensed, and that such provisions are prohibitory, not merely regulative and that such simple questions simply were that since the Sisters of St. Francis was a corporation, operating a hospital in Oklahoma City, Oklahoma, it could not take or

hold said farm and that the question was not novel and extremely difficult, but was actually a simple lawsuit.

34.

This plaintiff, with reference to Paragraph 20 of the Cross Complaint, denies that he was beset with legal disadvantages merely because the Sisters of St. Francis was a Catholic religious society and operated a hospital in Oklahoma City, Oklahoma.

35.

This plaintiff specifically denies that he filed a guardianship case against his sister in 1950 in an attempt, during her lifetime, to obtain possession of her property and that he failed in said action, but alleges the true facts to be that [fol. 261] his sister, at such time, was in a poor state of health, mentally and physically, and that he filed a Petition for Appointment of a Guardian, asking the Court to appoint him or any other suitable person to be guardian and that he told the County Judge to appoint any person that he saw fit and that the judge, after a full and complete hearing, held that Birdine Fletcher was incompetent to handle her affairs and appointed the Fidelity National Bank of Oklahoma City, as her Guardian without any objection or protest upon the part of A. J. Simler. That plaintiff was acting in the utmost good faith to help and aid his sister during her incompetency which the County Court found to exist when she was fully represented by counsel and after hearing many expert witnesses and medical doctors as to her condition and that when she filed an application to be restored to competency, the said A. J. Simler appeared in Court and told the County Judge that if the judge thought she was mentally competent to look after her affairs, that he had no objection whatever to her being restored, that he was only acting for her interests and not his own. That the said A. J. Simler testified in such last case that his sister had shown improvement and that, the County Judge then restored her to competency. That said proceedings somewhat irritated his sister, Birdine Fletcher, and that he believes that she was later influenced and that,

as a result, she did not leave to him her property when she and the officials of the Sisters of St. Francis, or employees, prepared the will for Birdine Fletcher, deceased.

36.

This plaintiff now shows that after said guardianship [fol. 262] proceedings, Birdine Fletcher gave this plaintiff a check for $500.00 as a gift and that she then realized he had acted for her best interests, but later when she became ill and was in said hospital, he believes and therefore alleges that she was unduly influenced against him, but that the said Leslie L. Conner and his associate counsel lost the will case under such circumstances.

37.

This plaintiff, with reference to Paragraph 29, specifically denies that the defendant paid out additional rent or paid additional money to employees on account of handling the litigation involved and mentioned in the Cross Complaint, but alleges the true facts to be that the said Leslie L. Conner carried on his regular law practice in the same manner as he would have carried it on and with the same compensation he would have received had he not handled the case of this plaintiff, and shows that in addition thereto, that the said Leslie L. Conner told this plaintiff that he would have to hire or did hire a special stenographer for a short time and asked this plaintiff to pay him therefor, which the said plaintiff did pay to the defendant herein.

38.

This plaintiff denies the allegations in Paragraph 30 of the Cross Complaint and shows to this Court in connection therewith that this plaintiff paid to Leslie L. Conner money for traveling expenses, hotel bills in Denver, Colorado and other places and paid for a trip for Arnold Britton to go to El Paso, Texas, and that Leslie L. Conner charged [fol. 263] this plaintiff with his own personal expenses in going to Denver and other places in connection with this matter and this plaintiff specifically denies that Leslie L. Conner ever went to Washington, D. C. to the Supreme

Court of the United States on any matter connected with the litigation herein and that neither lawyer appeared before the Supreme Court of the United States, and that if Leslie L. Conner went to Washington, D. C., he went on some other matter, and no business connected with any litigation pertaining to the Birdine Fletcher Estate or this plaintiff.

39.

This plaintiff denies specifically that the defendant, Leslie L. Conner or anyone associated with him put in five years of work and labor in this cause, but alleges the true facts to be that his work was very spasmodic and did not require very much work or labor in connection with this case, and no expense unknown to this plaintiff, and plaintiff shows that he has paid out as expenses in this case and paid to Leslie L. Conner for expenses large sums of money, the exact amount of which at this time is unknown to this plaintiff, but will be well known to the defendant, and the said defendant has a record thereof or should have, and that the said Leslie L. Conner carried on his law practice as usual during said litigation and looked after his practice in the usual normal and ordinary way.

40.

This plaintiff shows to this Honorable Court that he has been continually harassed, harangued, embarrassed and [fol. 264] annoyed by the said Leslie L. Conner and his associates in that James E. Grigsby, one of the associates of Mr. Conner, sued the said A. J. Simler, attached his real property and that the case was removed to the United States District Court for the Western District of Oklahoma, and that the said A. J. Simler was forced to employ other counsel to represent him in said suit and did employ John B. Ogden to represent him therein and to assist Leslie L. Conner in the conclusion of the estate case with reference to the payment of attorney fees, administrator's costs etc., in the District Court of Oklahoma County, Oklahoma, and the Supreme Court of the State of Oklahoma, and paid the said John B. Ogden $7500.00 for his services in con-

nection therewith and in order to settle the lawsuit with James E. Grigsby and attempt to get his runs or production from his farm released, settled said case with the said James E. Grigsby for the sum of $12,800.00 and took an assignment from the said James E. Grigsby for 28% of the attorneys fee which would become due to Leslie L. Conner and that Leslie L. Conner had assigned to James E. Grigsby 28% of his fee which this plaintiff now owns and that the said 28% was assigned over to the said A. J. Simler by the said James E. Grigsby and the said A. J. Simler paid the said James E. Grigsby $12,800.00 for the same.

41.

This plaintiff shows that thereafter, Arnold B. Britton, another associate or employee or partner of the said Leslie L. Conner, sued the said A. J. Simler, attached his farm and the case was removed to the United States District Court [fol. 265] of the Western District of Oklahoma, and that the said A. J. Simler was forced to defend said action and that he did defend the same and had counsel appear in both the Grigsby Case and the Britton Case and contest the same, attend various motions, pre-trial conferences, and that the said A. J. Simler was forced to make many trips from his home in Little Rock, Arkansas at great expense, annoyance and inconvenience to defend said cases which the said associates, employees or partners of the said Leslie L. Conner filed against him, and that the said Conner could not control said parties and admitted that he could not control his own partners and associates and that by virtue thereof, this plaintiff has expended large sums of money and has been continually troubled and harassed by virtue thereof, and by virtue of having the runs from his property impounded by the Phillips Petroleum Company and the same is still impounded, this time, however, by virtue of the conduct of the said defendant, Leslie L. Conner.

42.

This plaintiff shows to this Honorable Court that at this time he is 81 years of age and that such annoyance, harassment and expense has caused him great anxiety and dis-

turbance and that the said Leslie L. Conner failed in his duties either in associating said parties in said litigation and in failing to control said parties and the said Leslie L. Conner wrote a letter to this plaintiff on October 4, 1955, which is in words and figures, as follows:

[fol. 266] "October 4, 1955

Mr. A. J. Simler
R. R. #3
Box 334
North Little Rock, Arkansas

Dear Mr. Simler:

Enclosed find our copies, which we have made and enclose, of the following pleadings filed in the Phillips case.

A. Answer and Counterclaim of Phillips Petroleum Corporation in which they state that Wilson and the Sisters are still claiming interest.

B. Separate Answer of James E. Grigsby.

C. Motion for Production of Document.

D. Notice to take Deposition on Oral Examination.

I have been out of the city for the past few days and on my return, I found these papers: Notice to produce documents and contract, and Notice to take your deposition. According to the certificate he mailed your copy, which you probably have by now. Under the federal rules you are required to be present in person for the taking of the deposition on the date set out in the notice or, have it continued.

Since we are not informed as to your recent conversations with Mr. James E. Grigsby, relative to his employment, and in as much as he has filed an answer and counterclaim without our consent or approval, and which we do not believe is a proper part of this case, and since you think there is a question about the attorneys' fee due, it is our suggestion that you engage counsel to represent you in the question of Grigsbys' Cross-Petition about his fee matter, only, and we will

continue to represent you and do our best to bring this original litigation to a conclusion.

Due to the urgency of this matter, we are sending a copy to Mr. Kenneth Coulter, Court House, Little Rock, Arkansas and we suggest that you advise us immediately as to your decision in this matter.

Yours truly,

CONNER, HILPIRT & BRITTON

By LESLIE L. CONNER

LLC:djh
Enc.

P.S. Under separate copy we are sending you a copy of the Answer Brief in the Sisters' and Wilsons' Petition for Certiorari in the Supreme Court of the United States"

[fol 267] 43.

This plaintiff further shows to this Honorable Court that after he signed the letter prepared by Leslie L. Conner under the circumstances hereinabove set out on the 25th day of September, 1952, that he advised the said defendant that he would not proceed under said letter, and that the same was unfair, unjust and was not binding upon him and that he would only pay Leslie L. Conner, a reasonable fee and that was the only condition under which he would proceed with said litigation and that the said Leslie L. Conner, in the presence of Arnold Britton, James E. Grigsby and Phil E. Daugherty, tried to get the said plaintiff herein to sign a deed for one-half of the farm of this plaintiff, or 80 acres, and this plaintiff told all of said parties in the private office of Leslie L. Conner that he would not pay 50% or give up half of his farm under any conditions whatsoever, and that said lawyers then attempted to get him to sign said deed and he steadfastly refused and told all the lawyers he was not bound by a 50% agreement, and that if they did not want to proceed on reasonable fee terms, he would quit and would not under any conditions pay 50% or one-half of his property, but would only pay a rea-

sonable fee and that finally, after the said Simler and the parties had remained in the office for approximately an hour or more, Mr. Phil E. Daugherty stated "Simler definitely isn't going to sign this and there is no use to talk with him further about it."

44.

This plaintiff shows now that the said Phil E. Daugherty [fol. 268] made the said statement quoted in Paragraph 43 above at least twice, and finally, after more than one hour of haranguing this plaintiff, said meeting was adjourned, and this plaintiff now shows that after the said Leslie L. Conner knew of said matter and proceeded to represent the plaintiff thereafter that he then became estopped to claim or assert anything other than the reasonable lawyer fee, and that was the basis upon which he was employed to begin with and the basis upon which he represented Mr. Simler during the litigation.

45.

This plaintiff shows that Kenneth Coulter mentioned in the letter quoted below, was the son-in-law of the said A. J. Simler, plaintiff in this cause, and was Court Reporter at Little Rock, Arkansas in the Chancellor Court, but that the said Kenneth Coulter is now deceased, but that during his lifetime, he advised Mr. Conner that Mr. Simler would not and should not pay anything other than a reasonable fee and that if the said defendant wanted anything more than a reasonable fee, that he should not proceed further as attorney for the plaintiff herein. Mr. Coulter's letter above mentioned is quoted below as follows, as written by the said defendant, Leslie L. Conner:

October 24, 1955

"Mr. Kenneth Coulter
Court House
Little Rock, Arkansas

Dear Mr. Coulter:

Your letter of October 21 is acknowledged and you are advised that Mr. James E. Grigsby has not been fired from our staff.

We agree that the constant threat of litigation is [fol. 269] most annoying, and if you and Mr. Simler think that an advancement to Mr. Grigsby, without prejudice to anyones rights would be advisable, we would cooperate.

We are sorry to learn of Mrs. Simlers illness and trust that she is improved. Please advise us.

Yours very truly,

(Signed) LESLIE L. CONNER"

LLC/ab
cc A. J. Simler

46.

This plaintiff further shows that, finally, his patience was exhausted on account of all the litigation and lawsuit and harassment and that he discharged the defendant by written letter, and that after said time, the parties agreed that the said Conner could continue without any prejudice to his rights or the rights of this plaintiff in connection with the settlement of the lawyer fee, and that he was permitted to continue at the suggestion of John B. Ogden, attorney for the plaintiff herein, and it was distinctly agreed and understood that it should be without any prejudice to the rights of the defendant or of the plaintiff with reference to a lawyer fee in this cause.

47.

This plaintiff, now shows, however, that at all times shortly after the letter of September 25, 1952 was written, the said Conner knew that the said plaintiff in this cause would not agree to anything other than a reasonable fee and refused to recognize the letter of September 25, 1952.

48.

This plaintiff further shows that he wrote a letter on [fol. 270] the 16th day of December, 1955 to the said Leslie L. Conner, and sent the same by registered mail and that the said Conner received the same, which letter is in words and figures as follows, to-wit:

"Oklahoma City, Oklahoma
December 16, 1955

Mr. Leslie L. Conner
Attorney at Law
Hightower Building
Oklahoma City, Oklahoma

Dear Sir:

Affirming our telephone conversation of this A.M. in which you definitely refused to commit yourself as to the amount of attorneys fees you would accept as my counsel, and further, because of dissension among your force, I believe it impossible for you or your force to serve my best interest, and I am compelled, (much as I regret it), to dispense with your services, as of this date.

Yours truly,

(Signed): A. J. SIMLER"

49.

This plaintiff shows to this Honorable Court that the said Grigsby and Conner became either quarrelsome with each other or disagreed for some cause, and each one would call or write the plaintiff, criticizing the other, and would either come or send people to Little Rock in an effort to gain an advantage over the other.

50.

This plaintiff shows that the defendant suggested that the said plaintiff employ counsel to represent him and this plaintiff shows that he wrote Leslie L. Conner on September [fol. 271] 29, 1955, and advised him specifically as to previous statements and conduct of the said Leslie L. Conner, which letter is in words and figures as follows:

"No. Little Rock, Arkansas
September 29, 1955

Mr. Leslie Conner,
414 Hightower Building,
Oklahoma City, Oklahoma

Dear Sir:

Yours of 9/19 to hand, and in reply will say as to your understanding of my statement of Dec. 10, 1954, when four of five of you attys. tried to high pressure me into signing a deed to 80 acres of the farm, and my refusal, you will recall that upon a question from Mr. Griggsby as what I intended to do, I replied that the only contract I recognized was the one containing the proposition that you yourself, Mr. Conner, made to represent us in this case. That one was for a reasonable fee & if we could not agree as to a reasonable fee we would let the Co. Court or any other court decide a reasonable fee. As to your hiring other lawyers, that was your own proposition. It is no fault of mine that you were not big enough to handle this case. As you must recall, I, thru Mr. Coulter, attempted to get you to discuss this proposition about August 30th, 1954 and you flew into a rage, stating that when the case was finally settled was time enough to talk fees. So your statement that you did not know of my dissatisfaction as to your claim of fifty per cent was grossly in error.

Furthermore, I now direct, as I have told you before, not to file any more law suits against Phillips Petroleum Company or anybody else without specific instructions from me.

Again assuring you of my willingness to be more than fair in this matter I am

Yours very truly;

(signed) A. J. Simler
Route 3, Box 334
No. Little Rock, Ark."

51.

On August 31, 1955, the plaintiff wrote the defendant a letter which was received by the defendant, and which is [fol. 272] in words and figures as follows, to-wit:

"North Little Rock, Arkansas
August 31, 1955

Mr. Leslie L. Conner,
414 Hightower Building,
Oklahoma City, Oklahoma

Dear Mr. Conner:

I am in receipt of your letter of August 25 inclosing checks which is figured upon a fifty per cent fee to you. You urged me to make such an agreement on December 10th last, and to sign a quitclaim deed to that effect which proposition I refused. You are advised that my position remains as it has always been; I will not convey to you, as a part of your fee, any part of this realty. The contract of July 18, 1952 provides for a reasonable fee, and if we are unable to agree upon what constitutes a reasonable fee, I am willing to leave it to the Court, as per said contract. The proposition was made by you, accepted by me, and your proposition now comes as a surprise. Please remember that, at considerable expense to us, we lost completely in the Oklahoma state courts.

I am considering submitting this matter to an unbiased and unprejudiced attorney. In that connection I would like to have the following:

1. Copy of motion of Phillips Petroleum Company to pay over the money in their hands;
2. Order upon such motion;
3. Photostatic copy of contract of July 18, 1952;
4. Photostatic copy of contract of September 25, 1952;
5. Photostatic copy of other contracts, if any, relating to fee.

You will recall that I executed a will, which I believe was in the latter part of September, 1952, which I left in your safekeeping. Please send this to me:

Very truly yours,

(Signed) A. J. SIMLER"

[fol. 273] 52.

This plaintiff further shows to this Honorable Court that he received a letter from the defendant in regard to the case of Britton versus Simler, wherein Mr. Britton had sued Mr. Simler, claiming a large lawyer fee against him, and that Mr. Simler was forced to and did employ counsel to represent him in said cause, and the defendant, Leslie L. Conner, did not represent him therein but did make a suggestion in the matter and said letter referred to said cause from the defendant Leslie L. Conner is in words and figures as follows, to-wit:

"November 9, 1956

Mr. Phil E. Daugherty,
Lawyer,
First National Building
Oklahoma City, Oklahoma

Mr. John B. Ogden,
Lawyer,
Liberty Bank Bldg.,
Oklahoma City, Oklahoma

Gentlemen:

Re: Britton v. Simler

We learned today that this case is set on the pre-trial docket before Judge W. R. Wallace on November 16, 1956.

We enclosed the original letter from Britton to Simler which Mr. Ogden sent us after Mr. Simler mailed it to him.

When I talked to Britton about this and before the suit was filed he told me that Mr. Simler had agreed

to pay him a fee and employed him when he went to Arkansas to see Mr. Simler last year.

However, in this letter he says Mr. Simler employed him in January 12, 1956 and in the rth paragraph of the letter he says Mr. Simler agreed that a substantial fee had been earned when he visited Mr. Simler in his home in Arkansas.

In the complaint he alleges that he was employed on [fol. 274] July 18, 1952 and performed legal services to March 1956 when he without notice left me and that in May 1956 that Simler discharged him.

It seems that either deposition should be taken or interrogatories should be served to definitely get his claim. However, this is merely a suggestion to you.

Yours truly,

(Signed): Leslie L. Conner"

53.

This plaintiff further shows to this Honorable Court with reference to the litigation in the United States Circuit Court of Appeals, Tenth Circuit, reported in 210 Fed. 2d, beginning at Page 99, that in the trial court, namely the United States District Court of the Western District of Oklahoma at Oklahoma City, Oklahoma, there was no evidence offered. The matter was disposed of by motion and ruling of the court and not one witness on either side was produced or testified. That it was not a trial that even required the listening to one witness on either side, but was merely a simple question of law plainly written in the Constitution and Statutes of the State of Oklahoma, and that the said Leslie L. Conner did not even appear in Denver in the United States Court of Appeals and argue said matter, but that James E. Grigsby argued said matter in the Court of Appeals in Denver, and that the plaintiff herein paid his expenses for going to Denver to argue said matter, and that on September 11, 1953, the said defendant, Leslie L. Conner, wrote plaintiff with reference thereto, which letter is in words and figures as follows:

[fol. 275]

"September 11, 1953

Mr. A. J. Simler
Rural Route #3
Box 334
North Little Rock, Arkansas

Dear Mr. Simler:—

Enclosed find speech which James E. Grigsby made before the Circuit Court of Appeals at Denver on Thursday September 10, 1953. I received a call from Mr. Grigsby last night from Denver, and he said the speech and argument was very well received by the Court. We should have an opinion from the Court in this case within the next 60 days.

We will keep you advised.

Yours truly,

(Signed) "Leslie L. Conner R"
Conner, Hilpirt & Britton"

54.

This plaintiff most respectfully shows that Conner, Hilpirt and Britton used the name of "Conner, Hilpirt and Britton" on its letterheads and also had the name on the letterheads of Leslie L. Conner, Charles W. Conner, A. L. Hilpirt, and Arnold B. Britton, leading this plaintiff to believe that the firm was representing him, but the plaintiff has learned since that Mr. Hilpirt was deceased for the greater part of the time, and although the letters were signed, as indicated above, "Conner, Hilpirt & Britton", the said Hilpirt was deceased and the plaintiff has been informed and verily believes, having received his information from Leslie L. Conner, that Mr. Britton was not even a member of the firm, and that such conduct on the part of the defendant mis-led the plaintiff herein.

[fol. 276] 55.

This plaintiff now shows to this Honorable Court that many of the suits filed by the firm mentioned in Paragraph 54 herein were unnecessary, and only created expense which this plaintiff was forced to pay, and which suits were eventually lost, and that this plaintiff paid all expenses in the Supreme Court of the State of Oklahoma on the will contest, which was lost, and that actually, the only case that was won was the case of "Simler vs. Wilson", reported in 210 Fed. 2d, Page 99, supra, and in the Supreme Court of Oklahoma, on the question of costs and attorneys fees, the Supreme Court held, in effect, that the plaintiff in this cause should not be required to pay the bequest under the terms of the will of the late Birdine Fletcher, his sister, which bequest had already been paid and that under the terms of the will, it was construed that she intended that the bequest be paid out of her personal property money and bonds on hand, but the said plaintiff was required to pay all the attorneys fees, costs of administration and taxes, which amounted to more than $100,000.00.

Wherefore, having fully answered herein and replied to the Counterclaim, this plaintiff prays that the prayer of the Counterclaim and the Counterclaim of the defendant, Leslie L. Conner be denied and this Court fix a reasonable attorneys fee for the defendant herein and determine what is a reasonable fee under the circumstances and under the evidence, and that plaintiff have his costs herein expended, for such other relief as may appear proper, whether [fol. 277] legal or equitable, general or specific, to which the evidence may show him entitled.

John B. Ogden, 1408-1411 Liberty Bank Building, Oklahoma City, Oklahoma, Attorney for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 278] *Duly sworn to by A. J. Simler, jurat omitted in printing.*

[fol. 279]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008—Civil

[Title omitted]

REQUEST FOR JURY TRIAL—May 14, 1959

Comes now the above named plaintiff, A. J. Simler, and shows to the Court that he has heretofore requested a jury trial in this cause and that he now again requests that this cause be submitted to a jury to determine the facts herein and hereby specifically requests a jury trial in this cause.

Dated this the 14th day of May, 1959.

A. J. Simler, Plaintiff, By John B. Ogden, 1408-1411 Liberty Bank Bldg., Oklahoma City, Oklahoma, Attorney for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 281] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008—Civil

[Title omitted]

AMENDED REPLY TO DEFENDANT'S COUNTERCLAIM—
Filed June 30, 1959

Comes now the above named plaintiff, A. J. Simler, and for his amended reply to defendant's counterclaim and shows to this Honorable Court as follows:

That heretofore this plaintiff filed a reply to the defendant's counterclaim as authorized and directed by this Court and which reply consisted of 34 pages and approximately 55 paragraphs. That thereafter the defendant filed a motion to strike a major portion of said paragraphs, all as more fully appears from the motion filed by the defendant to strike and on file in this cause.

Thereafter, this Court, in passing upon said motion issued a letter to the attorneys in this cause which letter is in words and figures as follows, to-wit:

"Gentlemen:

At the time of our last hearing several matters were taken under advisement. The court now wishes to make the following rulings:

(1) Plaintiff's motion to strike or suppress the deposition of certain employees of Phillips Petroleum should be OVERRULED.

(2) Defendant's motion to strike from reply should be OVERRULED as to paragraphs 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15 and 16 but should be SUSTAINED as to paragraphs 10, 12, 17, 19, 20, 21, 22, 24, 25, 26, 29, 30, both paragraphs 31 of page 16, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 55.

[fol. 282] (3) Plaintiff is directed to file an amended reply to defendant's counterclaim which omits the paragraphs which have been stricken above.

Furthermore, the court has concluded that the matters raised herein are properly triable by jury and will be tried on August 24th.

The court will permit the introduction of both letters in question as representing the contract between Mr. Simler and Mr. Conner, and the issues to be resolved by the jury are whether this contingent fee contract was made in good faith, without fraud or overreaching by Mr. Conner and whether the compensation bargained for was just and fair. If the jury determines that the two letters in question are enforceable then the terms therein will control. However, if for any reason, the jury strikes down the second letter as having been gained through fraud or overreaching then the jury will have to determine just what constitutes a reasonable fee under the circumstances.

Very truly yours,

/s/ W. R. Wallace

> A copy of this letter is being mailed to Mr. Davis, the Court Clerk, and he is directed to enter minute orders which conform with this letter."

and which letter was received by plaintiff's counsel, John B. Ogden, on June 22, 1959. This plaintiff shows to this Court that he feels that this Court should not have sustained said motion as to the paragraphs quoted above, for the reason that this plaintiff feels that this denies to him his substantial rights in this case and prevents him from having a fair and impartial trial herein, and he therefore most respectfully wishes to show herein that he strenuously and seriously objects to said order and to the striking of said paragraphs and excepts to the ruling of the Court in striking said paragraphs, but in obedience to and in accordance with the direction of this Court and without waiving any of his rights, files this, an amended reply to the counterclaim of the defendant Leslie L. Conner, and for such amended reply, alleges and states:

[fol. 283] I.

This plaintiff specifically denies that he entered into an agreement on September 25, 1952 for the purpose of clarifying the terms of the contingent fee contract entered into on July 18, 1952 between the plaintiff and the defendant, Leslie L. Conner.

II.

This plaintiff shows to this Honorable Court that the true facts with reference to the letter dated September 25, 1952 and referred to in Paragraph 2 of the Counterclaim are as follows.

III.

This plaintiff shows that heretofore and on or about July 18, 1952, he was introduced to the defendant, Leslie L. Conner, and the plaintiff had not prior thereto known the said Leslie L. Conner and that on said date the plaintiff and defendant discussed employment by the plaintiff of the said defendant to represent this plaintiff as his attorney

in a certain will contest case then filed and pending or about to be filed in the County Court of Oklahoma County, Oklahoma, involving the will of plaintiff's deceased sister, Birdine Fletcher. That at the time of the death of Birdine Fletcher, she owned real property in Oklahoma City, Oklahoma, personal property, bonds, notes and securities and the real estate consisted of a farm located in Caddo County, Oklahoma and described in the Counterclaim of the defendant herein.

IV.

This plaintiff now shows that after a conference with the said Leslie L. Conner, he signed a letter of employment prepared by the said defendant and dated July 18, 1952, which letter of employment or copy thereof is pled in the [fol. 284] Counterclaim on file herein and in which and by the terms of which the said Leslie L. Conner was to receive for his services a reasonable fee and this plaintiff was to pay the cost of the litigation which might or would thereafter ensue, all as more fully appears from a copy of said letter pled herein, and which said letter of employment is in words and figures as follows, to-wit:

"July 18, 1952.

Mr. Leslie L. Conner, Atty.
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma

Dear Sir:—

Re: Birdine Fletcher Estate
County Court,
Oklahoma County, Okla.

This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her."

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from

court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the neighborhood of approximately $1,000.00.

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise. If the matter is not won, compromised or settled, you are not to charge us a fee.

Yours truly,

/s/ A. J. SIMLER

A. J. Simler, for himself and his children"

V.

This plaintiff now shows to this Honorable Court that [fol. 285] after the execution of said letter by the plaintiff, the relationslfip of attorney and client then existed and that the said defendant then became the attorney for the plaintiff and began representing the said plaintiff as his attorney in connection with the said estate or will contest.

VI.

This plaintiff shows that thereafter, the said Leslie L. Conner, defendant in this cause, prepared a will for the said plaintiff by the terms of which the said Leslie L. Conner was appointed attorney for the estate of A. J. Simler, plaintiff, and the said plaintiff at that time had great confidence in the said attorney, Leslie L. Conner, and on or about the 25th day of September, or shortly prior thereto, the defendant Leslie L. Conner called the plaintiff by telephone and asked him to come to the office of the said Leslie L. Conner and advised him that he should come down in

connection with re-writing the will of the said A. J. Simler and did not mention any change or modification or clarification of the contract of employment of July 18, 1952. The said plaiatiff went alone to the office of Leslie L. Conner, and believing at the time that he was going there for the purpose of some matter in connection with the changing of his will at the suggestion of the said Leslie L. Conner.

VII.

This plaintiff shows to this Honorable Court that at that time the offices where Leslie L. Conner officed had on the door and on their stationery "Conner, Hilpirt and Britton" and that he assumed by virtue thereof that it was a law firm and also by virtue of the fact that the letter of July 18, 1952 prepared by Leslie L. Conner, uses this language in part: "This confirms our employment of yourself and law firm * * *"

[fol. 286] VIII.

This plaintiff shows that when he arrived at the office of Leslie L. Conner, after a visit, the defendant suggested that he take the plaintiff to lunch and plaintiff and defendant went to a cafe where beer was served and the defendant herein suggested to the plaintiff that he drink some beer and have lunch, which the plaintiff did. Then, after lunch, the plaintiff and defendant, at defendant's suggestion, returned to the law office of the defendant and in the private office of the defendant Arnold B. Britton, an associate or employee of Leslie L. Conner, and Leslie L. Conner then proceeded to insist upon the plaintiff herein signing the letter dated September 25, 1952 and at that time this plaintiff had no advice other than the advice and admonition given him by his attorneys, Leslie L. Conner and Arnold B. Britton. That, at that time, the said Leslie L. Conner and Arnold B. Britton told the plaintiff that if he would sign the said letter, they would win for him everything in the estate and annul the will of Birdine Fletcher, and the said plaintiff herein argued with the said attorneys and told them that he was willing for them to have a reasonable fee as provided in his letter of July 18, 1952 but that the

said attorneys continued to harass, harangue and argue with this plaintiff, and coerced him and told him that it was to his best interest to sign said second letter on the 25th day of September, 1952.

IX.

This plaintiff shows to this Honorable Court that at that time, he was past 74 years of age, had not had experience in litigation, had no way of knowing what was reasonable, percentage-wise or otherwise in connection with the employment of attorneys and knowing that he had already [fol. 287] employed said attorneys for a reasonable fee, he continued to resist the demands, arguments, requests and advice of his lawyers to sign said contract or letter of September 25, 1952. This plaintiff further shows that he was worried over said litigation and greatly disturbed and had no one present with whom he could counsel and was not given an opportunity to seek outside or independent advice or counsel. Plaintiff shows that at that time he had great confidence in the said Leslie L. Conner and that the said Leslie L. Conner knew that this plaintiff was without advice or knowledge concerning said matter and continually and consistently insisted upon the said A. J. Simler signing said letter. This plaintiff further shows that at such time and on said date this plaintiff executed a will prepared by the said Leslie L. Conner in which will the said Leslie L. Conner inserted the following paragraph in Article 9 thereof:

> "I direct that the executor employ my attorney Mr. Leslie L. Conner, 410-415 Hightower Building, Oklahoma City, Oklahoma, as the sole and only attorney for my estate."

X.

That at said time the said Leslie L. Conner had already prepared before the plaintiff appeared in said office, the letter of September 25, 1952, and that said letter was not the idea, expression or will of this plaintiff, but constituted a prepared instrument by the said Leslie L. Conner before

he had even talked to this plaintiff and that the day of the month was blank on said letter and the word "*September*", then "——", "*1952*" was at the end or beginning of said letter. That the said defendant inserted with a pen the figures "25" in said date of the letter. This plaintiff shows to this Honorable Court that said letter did not express a [fol. 288] free and mutual consent or a free consent upon the part of the said plaintiff, A. J. Simler. That this plaintiff had no way of knowing, to begin with, what was a reasonable fee, and the letter of July 18, 1952 constituted the contract of employment and there was no consideration whatsoever between the parties for the execution of the letter of September 25, 1952.

XI.

This plaintiff shows to this Honorable Court that the said Leslie L. Conner is a lawyer of many years practice, is a graduate of the University of Oklahoma, licensed by the Supreme Court of Oklahoma, United States Court of Appeals, Tenth Circuit, United States District Court for the Western District of Oklahoma, and the Supreme Court of the United States, and that this plaintiff only has an eighth grade education, was old, worried and disturbed, and was without advice on said occasion except the advice of the said Leslie L. Conner and Arnold B. Britton, and that said defendant took advantage of his client in securing said letter and over-persuaded the said plaintiff to sign the said letter in the private, closed office of the said Leslie L. Conner, and the same did not constitute the will or desire of the said plaintiff, A. J. Simler, but was only the will and desire or expressed only the will and desires of the lawyer who prepared said letter, namely, Leslie L. Conner.

XII.

This plaintiff further shows that by virtue thereof said letter is void and void for the further reason that said letter was made and prepared for the benefit of the lawyer and to his advantage and is, therefore, void and of no force and effect because of the fact that the relationship of attorney and client then existed and the plaintiff had great

[fol. 289] confidence and respect for the said Leslie L. Conner, and his opinion and advice, and accepted the same solely in the signing of this letter over his actual protest.

XV.

This plaintiff further shows to this Honorable Court that the said Leslie L. Conner is estopped to rely upon said letter or plead the same or receive any benefits by virtue thereof, and that the said Leslie L. Conner, in procuring the signature of the said A. J. Simler on said letter, acted fraudulently and in bad faith and was guilty of actual fraud under the circumstances hereinabove shown, and by virtue of such fraud, said letter is void and of no force and effect.

XVI.

That in addition to the above, this plaintiff shows to this Honorable Court that the circumstances as hereinabove pled, under which said letter was signed, also show that the defendant was guilty of constructive fraud in the preparation of said letter and securing the signature of the said A. J. Simler thereon and thereto without any advice whatever to the said plaintiff except the advice of Leslie L. Conner and Arnold B. Britton, and by virtue of all the above, the said letter is absolutely void and of no force and effect and the defendant is not entitled to any benefits by virtue thereof or to claim any benefits or interest of any kind by virtue of said letter of September 25, 1952.

XVII.

This plaintiff specifically denies the allegations in Paragraph 6 of the Cross Complaint and denies that the letter of September 25, 1952 was mutually agreed upon between [fol. 290] the parties, but alleges the true facts to be concerning said letter as hereinabove set out and alleges and shows that said letter of September 25, 1952 is void and of no force and effect.

XVIII.

This plaintiff admits that a suit was filed in the Supreme Court, as alleged in Paragraph 10 of the Counterclaim of Defendant and as reflected by Exhibit 13, and as heretofore pled, the plaintiff admits that the Supreme Court of the United States denied certiorari as shown by Exhibit 16, and that Exhibit 17 mentioned in Paragraph 13 of the Counterclaim, reflects the ruling of the Court in said cause. That a suit was filed as alleged in Paragraphs 15, 16, 17, 18 and 19, and that the exhibits attached to the Counterclaim reflecting said proceedings, are true and correct copies of what they purport.

XIX.

The plaintiff admits the proceedings mentioned in Paragraph 21 and that the case was appealed to the Supreme Court of the State of Oklahoma, and is cited in 308 Pac. 2d, Page 304, as shown by Exhibit 32, attached to the defendant's Counterclaim.

XX.

This plaintiff admits that proceedings were had as shown and pled in Paragraph 23 of the Counterclaim, as reflected by Exhibit 33 and Paragraph 24 of Exhibit 34, with reference to Paragraph 25 of the Counterclaim.

XXI.

This plaintiff, with reference to Paragraph 20 of the Counterclaim, denies that he was beset with legal disadvantages merely because the Sisters of St. Francis was a [fol. 291] Catholic religious society and operated a hospital in Oklahoma City, Oklahoma.

Wherefore, having fully answered herein and replied to the Counterclaim, this plaintiff prays that the prayer of the Counterclaim and the Counterclaim of the defendant, Leslie L. Conner, be denied and this Court fix a reasonable attorneys fee for the defendant herein and determine what is a reasonable fee under the circumstances and under the evidence, and that plaintiff have his costs herein ex-

pended, for such other relief as may appear proper, whether legal or equitable, general or specific, to which the evidence may show him entitled.

John B. Ogden, 1408-09 Liberty Bank Building, Oklahoma City, Oklahoma, Attorney for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 366] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF OKLAHOMA

Case No. 8008-Civil

[Title omitted]

ORDER STRIKING DESIGNATED PARAGRAPHS OF REPLY TO COUNTERCLAIM—June 19, 1959

On June 19, 1959, the Court after argument on June 11, 1959, enters the following Order.

It Is Ordered that the Oral Motion of Plaintiff to Suppress the Depositions of witnesses of Phillips Petroleum Company taken at Bartlesville, Oklahoma, on June 8, 1959, in this case is overruled.

It Is Further Ordered that Defendant's motion to strike from reply should be Overruled as to paragraphs 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15 and 16 but should be Sustained as to paragraphs 10, 12, 17, 19, 20, 21, 22, 24, 25, 26, 29, 30, both paragraphs 31 of page 16, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 55, and Plaintiff is directed to file an amended reply to defendant's counterclaim, which omits the paragraphs which have been stricken above.

W. R. Wallace, United States District Judge.

[fol. 516]

UNITED STATES DISTRICT COURT
FOR THE EASTERN, NORTHERN AND WESTERN
DISTRICTS OF OKLAHOMA

W. R. WALLACE
JUDGE

OKLAHOMA CITY 1

September 29, 1959

[Filed—Sep 30 1959—Ted J. Davis, Clerk, U. S. District Court By Josephine P. Gore, Deputy]

Mr. Ted Davis,
U. S. District Court Clerk,
Federal Building,
Oklahoma City, Oklahoma.

A. J. Simler vs. Leslie L. Conner.
No. 8008 Civil.

Dear Ted:

At the request of Mr. John B. Ogden, one of the attorneys for Mr. Simler, in the above styled case, I am assigning this case to the Honorable Stephen S. Chandler, Chief Judge of the Western District of Oklahoma, for trial and disposition.

Sincerely yours,

W. R. WALLACE

[fol. 538]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 8008 Civil

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed November 23, 1959

Comes now the defendant and shows the Court that there is no genuine issue of any material fact in this case presented by the pleadings, or the depositions and admissions of both the plaintiff and the defendant:

—1—

That the action was brought by plaintiff, A. J. Simler, to have the Court determine the amount defendant, Leslie L. Conner, was entitled to as a "reasonable contingent attorney's fee" to be set by the Court for the legal services defendant performed and rendered as attorney for the plaintiff in cases resulting in the plaintiff obtaining oil runs and a valuable Caddo County Farm from the estate of his deceased sister, Birdine Fletcher, who had, previous to her death, willed him (her brother, A. J. Simler) "only $1.00, this amount and no more" from her valuable estate.

In the Complaint, plaintiff admits that he employed the defendant by written contract and that he employed him and agreed to pay him a "reasonable contingent attorney's fee" for the legal services which defendant was to [fol. 539] perform. Defendant in his Cross Complaint states that the reasonable attorney's fee was clarified by a letter of September 25, 1952, in which the parties agreed by letter that the "reasonable contingent attorney's fee" would be in the percentages, fixed at 25%, 33⅓%, or 50% of the recovery, if any, and if no recovery, defendant would not be paid an attorney's fee. Plaintiff by reply to the Counterclaim states by bare allegations that the clarification contract of September 25, 1952, before anything was won, was obtained by actual and constructive fraud.

—2—

That defendant, Leslie L. Conner, hereby moves the Court to enter Sammary Judgment for the defendant, in accordance with the provision of Rule 56 (b) and (c) of the Rules of Civil Procedure, on the grounds and for the reasons that the Answer, Counterclaim, and Cross Complaint and the depositions are Pre-Trial Admissions herein filed show that the defendant is entitled to judgment as a matter of law for a reasonable attorney's fee for the legal services performed by the defendant for and on behalf of the plaintiff, as contained in the contingent attorney's fee contract signed by plaintiff, dated July 18, 1952, and clarification contract defining "reasonable fee" of September 25, 1952, and as prayed in the Complaint and the Answer and

Counterclaim and Cross Complaint; that both plaintiff and defendant request the same relief in this action, and that in determination of the matter, it is a matter of law for the Court to determine.

[fol. 540]

—3—

That a reasonable contingent attorney's fee for obtaining real property, money, and monthly income therefrom in the cases filed, won, appealed, and obtaining the farm and oil runs for plaintiff through the County Court of Oklahoma County is as set forth in the contingent fee clarification contract of September 25, 1952, signed by plaintiff at 50% because all the cases were appealed to the Supreme Court.

—4—

That the only question of fact raised by the pleadings in this case is the bare allegation that the interpretative contract of September 25, 1952, stating what these parties intended by the use of the words "reasonable attorney's fee" in the first contract, was obtained by fraud. The allegations of fraud are merely a sham and conclusion of plaintiff's attorney to put the case at issue and as shown by the deposition of A. J. Simler and the affidavit and deposition of Leslie L. Conner, there is no genuine factual issue as to any material fact.

—5—

Defendant moves the Court to enter a Summary Judgment for the defendant as prayed in his Counterclaim and Cross Complaint and that the contingent reasonable attorney's fee due Leslie L. Conner be fixed at 50% of the amount of the recovery.

Robert O. Bailey, Attorney for Defendant.

[fol. 541] Certificate of Service (omitted in printing).

[fol. 542]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. SIMLER, Plaintiff,

vs.

LESLIE L. CONNER, PHILLIPS PETROLEUM COMPANY, a corporation, Defendants.

Case No. 8008.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed November 23, 1959

The pleadings, depositions, and file shows that plaintiff sued defendant to have this court determine what amount plaintiff owed defendant as a reasonable contingent attorney's fee for legal services rendered by defendant for plaintiff from July 18, 1952, to June, 1958. Plaintiff employed defendant on written contract agreeing to pay a reasonable fee to be set by the court which was dated July 18, 1952. (See Exhibit 1 of Affidavit.)

Thereafter, because of the proposed Federal Court litigation, plaintiff and defendant agreed that a reasonable contingent attorney's fee would be on a sliding percentage scale of 25% or 33⅓ or 50% if the case went to the Supreme Court.

Plaintiff had been left $1.00 as his part of his sister's estate, which she had inherited from her husband. He wanted more. Defendant in 6 years and 19 lawsuits, 3 of which were in the Supreme Court of the United States and 3 in the Supreme Court of Oklahoma, won a farm and fortune for plaintiff estimated at $400,000.00.

[fol. 543] Plaintiff wants the court to set amount of defendant's "reasonable attorney's fee."

Defendant Counterclaimed and Cross Petitioned asking the court to set the "reasonable contingent attorney's fee" as stated in the letter of September 25, 1952.

Subdivisions (a) and (b) of Rule 56 authorize motions for summary judgment by a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment and by a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought. Thus, unlike the procedure in many states, a summary judgment under this rule is available both to plaintiffs and defendants in all forms and kinds of civil actions to which these rules apply. (See Engl. v. Aetna Life Ins. Co., CA (2d) 1943, 139 F.2d 469)

Rule 56(c) fixes the standard by which to determine whether a summary judgment should be granted. It provides that the "judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (See Raylite Elec. Corp. v. Noma Elec. Corp., C.A.2d, 1948, 170 F.2d 914) and (SMS Mfg. Co. v. U. S. Mengel Plywoods, C.A. 10th, 1955, 219 F.2d 606.)

It is perfectly clear on principle that pleading allegations do not create an issue as against a motion for summary judgment supported with affidavits. The very object of the summary judgment procedure, as Cardozo said long [fol. 544] ago, is "to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." The rule was intended to permit a party to pierce the allegations of fact in his opponents pleadings. (See Engl. v. Credit Suisse, 1926, 152 N.E. 110, 111, 242 N.Y. 346, 350.)

Very Respectfully Submitted,

Robert O. Bailey, Attorney for Defendant.

[fol. 545]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 8008–Civil

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT —Filed November 23, 1959

State of Oklahoma,
Oklahoma County, ss.:

Leslie L. Conner, being first duly sworn on oath, deposes and states:

—1—

I am Leslie L. Conner. I am a lawyer and a member of the Bar of the Supreme Court of the State of Oklahoma; all the Federal District Courts in Oklahoma; the Court of Appeals of the Eighth, Fifth, and Tenth Circuits; and the United States Court of Claims; and the Supreme Court of the United States. I have been engaged in the general practice of law in Oklahoma City, Oklahoma, since June 19, 1925. I am a graduate of the law school of the University of Oklahoma; and my law offices have been in the Hightower Building for the past 27 years. I, as defendant herein, have personal knowledge of the facts herein set forth. This Affidavit is submitted in support of the defendant's motion for Summary Judgment herein for "a reasonable contingent attorney's fee" for legal services performed by defendant as attorney for and on behalf of the plaintiff, A. J. Simler, and for the purpose of showing that there is in this action [fol. 546] no genuine factual issues as to any material fact and the defendant is entitled to Summary Judgment against plaintiff as a matter of law.

—2—

I, Leslie L. Conner, was employed by plaintiff, A. J. Simler, as his lawyer to represent Simler on a written con-

tingent fee agreement (Exhibit 1 & 2). The legal services were rendered by me over a period of 5½ years in 19 cases, three in the Supreme Court of Oklahoma, three in the Supreme Court of the United States, and several in the State District Court and Federal District Court and in the Court of Appeals.

On July 18, 1952, Mr. Simler employed me on a reasonable contingent attorney's fee (copy of written contract attached as Exhibit 1) basis to try to recover a valuable oil producing farm belonging to the Estate of Birdine Fletcher. Mr. Simler was her sole heir at law and by the terms of her will he was left the sum of $1.00. The farm was devised to the Sisters of St. Francis, a Missouri corporation, by the terms of the Will.

I began investigation in preparation to contest the admission of the Will of Birdine Fletcher to probate in the County Court. On July 30, 1952, Mr. Simler directed the filing of the contest (See Exhibit 3). During the two months after my employment by Mr. Simler, it became apparent that I could not handle this litigation alone, and it would be necessary to employ other attorneys to assist me in the case. It was also determined that a declaratory action in the Federal Court was possible to determine the right of the Sisters of St. Francis, a Missouri corporation, to hold real estate outside a city or town not used in the business. [fol. 547] It was my opinion that the Will prepared for Birdine Fletcher, was not valid and it was my opinion that if we could judicially determine that the Sisters could not take the land then the devise by Will to the Sisters of St. Francis would fail and the farm would pass to Mr. Simler, he being the sole heir at law of Birdine Fletcher.

In September, 1952, I advised Mr. Simler of my investigation, findings, the proposed Federal Court action, and the necessity of other lawyers to assist me. I advised him that the other attorneys employed would be paid from my contingent fee contract. I proposed to Mr. Simler that we clarify the July 18 contract by agreeing on what a "reasonable fee" would be. Mr. Simler agreed that a graduated scale of 25%, 33⅓, or 50% would be reasonable and Simler signed the contract September 25, 1952, attached as Exhibit 2. Mr. Simler left my office satisfied with the agreement.

I employed James Grigsby and later Phil Daugherty to assist me, to be paid out of my contingent attorneys' fee. On October 14, 1952, Mr. Simler directed the filing of the Federal Court litigation (see Exhibit 4).

The Courts upheld the factum of the Will but I established by the Federal Court litigation that the Sisters of St. Francis could not hold real estate in Oklahoma outside a city or town not used in the business. (Summary of work done attached as Exhibit 5.)

The Declaratory Judgment action in the Federal Court broke the will, the devise of the farm to the Sisters of St. Francis failed and in May 1955, the County Court decreed A. J. Simler to be the owner of the oil runs and the farm.

[fol. 548] Mr. Simler knew all the facts, conferred almost daily with us and was satisfied with the contingent fee of 25%, 33⅓, and 50% and it was 2½ years later, and after the Federal Court action was won, that he evidenced a dissatisfaction with the graduated scale contract of September 25, 1952. (Exhibit 2).

The plaintiff has been decreed in the Estate of Birdine Fletcher, deceased, by the County Court of Oklahoma to be the owner of the following described real estate:

"Northwest Quarter (NW¼) of Section 34 Township 6 North Range 10 West, in Caddo County, Oklahoma."

which has 16 producing oil wells operated by Phillips Petroleum Company in the Medrano Sand Unit and is now producing approximately $3,300.00 per month for the Fletcher Farm, now owned by Simler. There is being held in suspense account by Phillips Petroleum Company the sum of over $90,000.00. Out of a $65,000.00 payout in May 1957, the plaintiff and defendant first paid the real estate mortgage from said funds which Simler put on the farm of $12,800.00 (Which he used to satisfy the suit filed by James E. Grigsby.) and then plaintiff paid defendant $24,000.00 on his fee. At this time, plaintiff signed (Exhibit 6 attached hereto) and recognized defendant's interest in the farm and runs and agreed not to sell, transfer, or encumber the farm until the attorney's fee was paid and settled. Plaintiff also

agreed in writing to pay defendant $1,500.00 a month for (See Exhibit 35 attached to Cross Complaint) 12 months or an additional $18,000.00, none of which he has paid (Which agreements and settlement was handled by John Ogden, his present attorney.)

Although, since then, plaintiff, A. J. Simler, (Without defendant's knowledge or consent and using his present [fol. 549] attorney) has received approximately $29,111.53 additional from refunds and other sources from said farm and estate.

Receipt signed by A. J. Simler, October 2, 1957 (Exhibit 8)	$16,679.31
Receipt signed by A. J. Simler, March 26, 1958 (Exhibit 9)	$11,132.22
Agriculture rent on 160 acre farm for 1958-1959 (Estimated)	$ 1,300.00

Simler has not notified defendant of these payments nor paid anything to defendant from them. The real estate is located within the jurisdiction of this Court described in both the Complaint and Answer and Counterclaim. The parties agreed in the employment contract of July 18, 1952, that the fee could be set by the Court. That the fixing of a contingent attorney's fee is a matter of law for the Court and not for the jury. (In C.R.I.& P. Railroad Co. vs. Rittenhouse, et. al., 285 P. (2) 186) (Jones vs. Farmers Insurance Exchange of Los Angeles, California, 112 F. Supp. 952.) (Wallace).

—4—

That the depositions taken pursuant to Rule 26 of both plaintiff and defendant are filed herein showing that the plaintiff, A. J. Simler, employer by the defendant, Leslie L. Conner, as his attorney to represent him and to render the legal services and all the services were rendered for A. J. Simler and that he has accepted the title to the farm and all the benefits therefrom. Plaintiff admits he employed defendant as his attorney and signed the contingent fee contract letter of July 18, 1952. (Page 8 of his deposition)

and signed the clarification contract of September 25, 1952, [fol. 550] (Page 19 of his deposition) and the letter of July 30, 1952, (Page 17 of his deposition) and the direction to start Federal Federal Court litigation October 14, 1952, (Page 39 of his deposition) and at page 65 A. J. Simler, testified:

> Q. All right, are you willing to pay a reasonable fee?
> A. Yes sir, I always have been.

Pre-Trial Admissions

At the three pre-trials held in this case before Honorable W. R. Wallace, United States District Judge, to whom the case was assigned in April, 1958, and who held pre-trials thereon on March 23, 1959, June 11, 1959, and September 11, 1959, John Ogden, counsel for plaintiff, Simler, stated that he and his client, Simler, wanted defendant, Conner, to be paid a "reasonable attorney's fee."

Excerpt from transcript of the 64 page pre-trial of June 11, 1959, at Page 8, Counsel John Ogden admitted for the plaintiff:

> "In addition to that, if the Court please, Mr. Conner is entitled to a reasonable fee, and that's what we want him to have; but he is not entitled to more than a reasonable fee."

Excerpt of the 143 page pre-trial of September 11, 1959, Counsel John Ogden admitted for the plaintiff at Page 21:

> "Mr. Ogden: It is a contingent fee. The contract so states, your Honor, please. And I want to say this to you, if your Honor please, and hope counsel will listen to it: We don't want to beat Mr. Conner out of one dime, not one penny. We want him to have everything he is entitled to. We just want him to have a reasonable fee, and whatever that is."

[fol. 551] And at Page 27:

> "The Court: I think that if this man was willed a dollar, and these boys, this attorney picked up for him an

estate that is worth quite a lot of money, that it seems to me that you can't even begin to argue that he is not entitled to an attorney fee."

And at Pages 27 and 28 Counsel admitted:

"Mr. Ogden: Judge, I don't, I never have, I didn't mean to and I am sorry to impress you that way. I say he is entitled to an attorney's fee, but a reasonable attorney's fee for his service for winning that property. There is not any question but what he is entitled to it."

From the pleadings, depositions, pre-trial admissions there is no material question of fact and plaintiff and defendant ask the same relief—a reasonable attorney's fee for the legal services rendered, work performed, recovery made, all on a contingent fee contract. Defendant by Counterclaim says same should be 50% of the recovery.

Leslie L. Conner

Subscribed and sworn to before me the 23 day of November, 1959.

J. Monroe Little, Notary Public.

My commission expires: June 4, 1962

[fol. 571] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008—Civil

[Title omitted]

AFFIDAVIT—Filed December 4, 1959

[fol. 572]

State of Oklahoma)
) ss
Oklahoma County)

Arnold Britton, of lawful age, being first duly sworn on his oath, states:

My name is Arnold B. Britton. I am an Attorney and Counselor at Law. I was admitted to the Bar of the State of Oklahoma on the 6th day of February, 1945, and have since that time been engaged in the practice of law in Oklahoma City. I am licensed to practice in the State and Federal Courts. I was associated with Leslie L. Conner in the practice of law from 1948 to March 1, 1956. I am acquainted with A. J. Simler. I met him some time in June of 1952. I was present with Mr. Leslie L. Conner on July 18, 1952, when Mr. Simler signed the contract employing Leslie L. Conner, of Conner, Hilpirt, and Britton. I know all the facts and circumstances surrounding that employment and the letter of September 25, 1952, and my deposition was taken by John Ogden in Case No. 7225-Civil, United States District Court for the Western District of Oklahoma on July 26, 1957, the attorney for A. J. Simler, defendant in that case.

I was present on July 18, 1952, with Leslie L. Conner when the letter contract was signed by A. J. Simler and I was also present in September, 1952, with Leslie L. Conner when the explanatory letter was signed by Mr. A. J. Simler.

Mr. Leslie L. Conner, Mr. A. J. Simler, and I were the only three persons present when these employment letters were signed. Both times there was a full discussion between Simler, Conner, and myself and in the September letter we

both explained to Simler that it was to the mutual advantage of all parties to agree on the term "reasonable attorney fee" on a contingent basis referred to in the July [fol. 573] 18, 1952 employment contract. There was no undue influence, overreaching nor information withheld nor representations made as to amount of recovery, if any, nor any other persuasion used to get Mr. Simler to sign these letters. He signed after being fully informed. He knew what he was doing and was very happy and satisfied when he left the office and everything was fine with him until 2½ years later, the recovery of the farm was made, and then he said that he did not want to be bound by the 50% contract.

Arnold B. Britton

Subscribed and sworn to before me this 3rd day of December, 1959.

Joe M. T. Wilson, Notary Public.

(Seal)

My commission expires: March 11, 1962

[fol. 577] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008

[Title omitted]

PLAINTIFF'S REQUEST FOR REVIEW OF RULINGS OF JUDGE W. R. WALLACE ON PLEADINGS AND PROOF—Filed December 8, 1959

Comes now the plaintiff and shows to this Honorable Court that heretofore this cause was originally presented to the Honorable W. R. Wallace, United States District Judge for the Northern, Western and Eastern Districts of the State of Oklahoma, and that said judge ruled upon a motion filed by the plaintiff and motions filed by the defendant and made certain rulings on a pre-trial conference or on several pre-trial conferences, all as more fully is reflected by the records, pleadings and files herein which are made a part of this motion by reference only.

This plaintiff shows to this Honorable Court that he believes that there was error in such rulings and that the rulings should be reviewed by this court and such errors corrected and the pleadings settled or determined by this Court, since this cause will be tried by this Court, and that this plaintiff feels that he should call to this Court's attention such rulings in order that the same may be corrected prior to the trial of this cause.

Wherefore, this plaintiff most respectfully requests this Honorable Court to review the rulings and orders of the Honorable W. R. Wallace, and to permit this plaintiff to re-present to this Court his contentions, pleadings and objections to the ruling of the Honorable W. R. Wallace on [fol. 578] the pre-trial conferences and on the pleadings, all as reflected by the records herein.

Respectfully submitted,

Jack M. Highley, Mutual Savings Building, Oklahoma City, Oklahoma and John B. Ogden, 1408-9 Liberty Bank Building, Oklahoma City, Oklahoma, Attorneys for Plaintiff.

Certificate of Delivery (omitted in printing).

[fol. 580] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8008

[Title omitted]

RESPONSE TO MOTION OF DEFENDANT FOR SUMMARY JUDGMENT AND COUNTER AFFIDAVIT OF THE PLAINTIFF, A. J. SIMLER—Filed December 8, 1959

Comes now the plaintiff in this cause, A. J. Simler, and for his response to the defendant's Motion for Summary Judgment and for Counter Affidavit of plaintiff herein, shows to this Honorable Court, as follows:

1. That this plaintiff denies generally and specifically each, every and all the allegations contained in said Mo-

tion for Summary Judgment, except such as are hereinafter specifically admitted.

2. That the plaintiff herein filed this action for declaratory judgment asking this Court to determine with the aid of a jury what was or is a reasonable fee for the defendant in representing him in a certain action or actions with reference to the estate of his deceased sister, Birdine Fletcher.

3. This plaintiff shows to this Honorable Court that on the 18th day of July, 1952, as alleged in the Complaint, he signed a letter of employment which was prepared by the defendant herein, wherein he agreed to pay the defendant a reasonable attorneys fee for his services as attorney.

4. This plaintiff now shows to this Honorable Court [fol. 581] that at that time, the said Leslie L. Conner became the attorney for this plaintiff and the relationship of attorney and client then and there existed from and after said date.

5. This plaintiff shows to this Honorable Court that thereafter, the said defendant did begin representing the said plaintiff herein as his attorney. This plaintiff shows that after said time and on the 25th day of September, 1952, the defendant called the plaintiff to his law office in Oklahoma City, and after much persuasion and over the protests of the said plaintiff, the plaintiff signed a letter referred to in the Motion for Summary Judgment as "Exhibit H" and this plaintiff now shows that the said letter was not signed by the said defendant, but was prepared by the defendant and that the same did not constitute a contract for the reason that there was no consideration therefor; for the further reason that there was never a meeting of the minds thereon and for the further reason that the said defendant herein, by coercion, false statements and fraud, procured the signature of this plaintiff to said letter dated September 25, 1952 and which letter was prepared by the said Leslie L. Conner and the date was not written into said letter at the time for the reason that the said defendant prepared same at a time unknown to the plaintiff and left the day of the month blank and wrote same in with a pen after said plaintiff appeared in the office.

6. This plaintiff further shows that there is a genuine issue of facts to be presented to the jury in this case.

7. This plaintiff shows that he agreed to pay to the [fol. 582] defendant a reasonable attorneys fee, but did not agree to pay the said defendant a percentage of any amount recovered and that the percentages mentioned in the second letter, that is the letter of September 25, 1952, was prepared, written and presented to this plaintiff on the 25th day of September, 1952, and that the said plaintiff was persuaded by the said defendant to sign said letter at such time, and the said plaintiff had no independent advice from anyone and was not permitted to talk with anyone with reference to said letter, and that at that time, there was no discussion of any kind with reference to anything concerning said estate except the probate of the will, and no case was mentioned with reference to a declaratory judgment or the right of the Sisters of St. Francis to take under the laws of the State of Oklahoma.

8. This plaintiff shows to this Honorable Court that the defendant is entitled to a reasonable attorneys fee if he has not already been paid same; that this plaintiff has paid to the said defendant the sum of $24,000.00 in cash, and that this plaintiff does not know whether said sum is or is not a reasonable attorneys fee for the services rendered, and in addition to the above, this plaintiff shows that one James E. Grigsby was assigned 28% of the attorneys fees which the said Leslie L. Conner was entitled to, and that this plaintiff was sued by the said James E. Grigsby in the United States District Court for the Western District of the State of Oklahoma for attorneys fees, and this plaintiff was forced to employ another attorney to represent him in said cause; and that said cause was compromised [fol. 583] with the said James E. Grigsby and this plaintiff paid to the said James E. Grigsby, $12,800.00, and took assignment from the said James E. Grigsby of his 28% of the attorneys fees which was due or would be due to the said defendant herein, Leslie L. Conner.

9. This plaintiff, in addition thereto, paid to John B. Ogden, $7,500.00 attorneys fees for his services in assisting the said Leslie L. Conner in litigation concerning said

estate in the District Court of Oklahoma County, Oklahoma, and the Supreme Court of Oklahoma, and in defending the said suits by the said James E. Grigsby, and also in defending his suit in the United States District Court for the Western District of Oklahoma, styled "Arnold B. Britton vs. A. J. Simler", wherein the said Arnold B. Britton sued the said A. J. Simler for attorneys fees and in representing the said A. J. Simler, herein.

10. This plaintiff shows to this Honorable Court, in addition to the above, that this plaintiff was forced to and did pay the attorneys fees for the opposing counsel in said litigation in the County Court, Oklahoma District Courts, the Supreme Court of Oklahoma, the United States District Court in Oklahoma, the United States Court of Appeals for the Tenth Circuit, and the Supreme Court of the United States, the amount of which has heretofore been plead and presented herein.

11. This plaintiff further shows to this Honorable Court that in addition to the payments of all the above sums, he has paid all the costs with reference to said litigation or incurred in connection therewith, and has paid personal expenses, such as hotel bills, traveling expenses and other expenses of the said Leslie L. Conner and the attorneys [fol. 584] associated with the said Leslie L. Conner in the handling of said litigation.

12. This plaintiff further shows to this Honorable Court that "Exhibit 7" attached to the Motion of Defendant for Summary Judgment in this cause does not in any wise admit nor was it intended to admit that the defendant has any interest whatever in the property of this plaintiff.

13. This plaintiff shows to this Honorable Court that the said Leslie L. Conner and this plaintiff, together with Phil E. Daugherty and John B. Ogden, attorneys, met in the office of John B. Ogden and it was specifically and orally agreed that said agreement dated May 22, 1957 would not be used in any wise in any court for or against any party and it would be executed without any prejudice to the rights of any parties either Leslie L. Conner or A. J. Simler, and in connection therewith, this plaintiff shows that the said Leslie L. Conner breached said agreement and has

attempted to attached said instruments to the pleadings in this cause and that said instruments provide in part, as follows:

> "Now therefore, without prejudice to the claims, contentions or agreement of either Leslie L. Conner or A. J. Simler with reference to said attorneys fees, it is agreed as follows:
>
> First. That this instrument and agreement shall in no wise be considered by any of the parties hereto as a construction of the agreement with reference to attorney fees between Leslie L. Conner and A. J. Simler, *and this agreement shall not be offered as evidence in any court by either of the parties hereto or any other persons, or the heirs, executors, assigns or administrators of any* of the parties hereto. It is understood between the parties that this agreement simply is made so that the money now on hand and to be distributed can be used in part and as hereinafter set out by the parties hereto. * * * "It is agreed between the parties hereto that all sums paid to Leslie L. Conner whether out of the oil runs or out of the money to be distributed [fol. 585] shall be credited on any fee eventually arrived at or agreed to between the parties or determined by any court."

14. This plaintiff shows that, nevertheless, the said Leslie L. Conner, having agreed in writing and orally that the said instruments would not be used against either of the parties, and it was executed without prejudice to the rights of any of the parties, has nevertheless attempted to and is now attempting to take advantage of this plaintiff by attempting to use said instrument herein and otherwise to gain an undue advantage over this plaintiff.

15. This plaintiff shows that therefore, he is entitled to have a jury determine the controverted issues of fact in this cause as to what is a reasonable attorneys fee for the services rendered herein, and that he has demanded a jury in this cause to determine said question and now and hereby demands a jury trial to determine said question of fact as to what is a reasonable attorneys fee for the services rendered herein.

16. This plaintiff shows to this Honorable Court that at the time the Estate of Birdine Fletcher, deceased, was appraised, the defendant in this cause was attorney for this plaintiff and that said estate was appraised at that time at $176,000.00, that is, the farm lands of this plaintiff was appraised at approximately $176,000.00, and that the said attorney, Leslie L. Conner, acquiesced in said appraisal or at least did nothing to change same or cause same to be changed, and that in consideration of the amount of money the defendant would be entitled to or was entitled to as attorney fees, the value of the property should be considered, [fol. 586] but that the value of the property should be fixed at the time the United States Court of Appeals, Tenth Circuit, held that the property was the property of this plaintiff and had been since the death of his sister, Birdine Fletcher, deceased.

17. This plaintiff shows to this Honorable Court that he has only what would be termed an 8th Grade Education; that he had never studied law or been versed in the law or the fixing of attorneys fees and that the second letter, that is the letter dated September 25, 1952, was not his conception or idea or thought as to what a reasonable attorneys fee is or was, and that he had no way of knowing what a reasonable fee was and that he was old, unversed, and worried, and that at that time he had faith and confidence in the defendant as his attorney and that said attorney told him that he was going to win the entire estate, including the money on hand, bonds, residence in Oklahoma City, debts owing the estate, and all matters in said estate and that he would cause the will to be broken, leaving the entire estate to this plaintiff; and that he wrote a will at the same time in which the said Leslie L. Conner named himself as the attorney for the Executor in case of the death of said A. J. Simler, and kept said will in his office; that is, the possession of the defendant; and plaintiff shows that said defendant mis-represented the facts to this plaintiff and induced him to sign said letter without any consideration therefor whatsoever.

18. This plaintiff shows that what the property has produced since said time is not proper for consideration in

this cause and that the defendant herein is only entitled [fol. 587] to a reasonable attorneys fee fixed in dollars and cents considering the value of the property at the time the same was recovered.

19. This plaintiff shows to this Honorable Court that the depositions on file in this cause, together with the pleadings herein; together with this affidavit show that there is a genuine issue of fact to be determined by a jury herein.

20. This plaintiff further shows to the Court that at the time Exhibit 7 was executed and by the terms thereof, this plaintiff agreed to pay out of the oil runs to the defendant $1500.00 per month until a certain lawsuit styled "Britton vs. Simler" was settled, but in any event, not to exceed one year from the date thereof and in connection therewith, this plaintiff states that he received no money from the said Phillips Petroleum Company for oil runs on account of the litigation and threatened litigation over attorneys fees and has not received any oil runs up to this time and that the said defendant knew of such fact at the time he made the affidavit in support of his Motion for Summary Judgment.

21. This plaintiff further shows that the rebate of refunds on estate taxes were supposed to be paid to him and that in the County Court the order provided that certain sums be withheld until all tax matters were settled with reference to said estate and that this plaintiff employ a tax firm to assist and check on the estate taxes and paid the sum of $2500.00 to said firm, and the Court decreed that whatever taxes or refunds were to be refunded to the plaintiff [fol. 588] herein, and that he was entitled under said order to said refunds mentioned by the defendant.

Wherefore; the plaintiff prays that the Motion for Summary Judgment be denied.

Jack M. Highley and John B. Ogden, Attorneys for Plaintiff.

Duly sworn to by A. J. Simler, jurat omitted in printing.

[fol. 596]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 8808—Civil

A. J. SIMLER, Plaintiff,

vs.

LESLIE L. CONNER, Defendant.

Reporter's Transcript of Proceedings—December 11, 1959

Before: The Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma.

APPEARANCES:

For the Plaintiff:

Mr. John B. Ogden, Attorney-at-Law, Liberty Bank Building, Oklahoma City, Oklahoma.
Mr. Jack M. Highley, Attorney-at-Law, Mutual Savings Building, Oklahoma City, Oklahoma.

For the Defendant:

Mr. Robert O. Bailey, Attorney-at-Law, Hightower Building, Oklahoma City, Oklahoma.
Mr. James M. Little, Attorney-at-Law, Hightower Building, Oklahoma City, Oklahoma.
Mr. Phil E. Daugherty, Attorney-at-Law, Fidelity Building, Oklahoma City, Oklahoma.

[fol. 656] Mr. Ogden: Credit, yes, as a matter of law. I want to say this now, and I am doing this, and I don't think it is necessary, but we want to now again advise the Court that we do not agree to try this case without a jury. We request a jury and we have requested it in every pleading we have filed. I believe, and we do not agree that the records as they now stand would give the Court a full

picture of the case; that testimony would have to be presented to the Court in order for the Court to be able to properly rule upon the case.

The Court: What additional testimony? I don't want to know what it is, but on what point would you offer additional testimony?

Mr. Ogden: Well, if Your Honor please, of course, we would naturally offer evidence to show what a reasonable fee was in a case of this kind.

The Court: Of course.

Mr. Ogden: That is one thing we would naturally do, because we think that would be proper. And then next, if Your Honor please, Mr. Simler has testified, he doesn't desire to change his testimony, but we do desire to corroborate it with other testimony which we think we have *at the time.*

The Court: How could there be any other testimony on [fol. 657] that point?

Mr. Ogden: Well, Mr. Conner and Mr. Simler are in complete disagreement in this on what took place.

The Court: There are only the two of them who were there.

Mr. Ogden: Well, if Your Honor please, I'm not saying—well, there was other people there, though, Judge.

The Court: Whose testimony are you going to rely on to add to it?

Mr. Ogden: Well, I think I'm going to rely on Mr. Arnold Britton. Mr. Arnold Britton sued Mr. Simler for attorney's fee.

The Court: You are going to use Mr. Britton now? What are you going to prove by him?

Mr. Ogden: Judge, I've got his deposition and as I recall it, he testifies in that deposition, I don't attempt to remember it in detail, but as I recall it, he testifies that it was after this county court case which was October the 2d, that Mr. Grigsby got up the idea to file this case in the Federal Court, that Mr. Conner had nothing to do with it, hadn't even thought about it, knew nothing about it; that Mr. Grigsby filed it and Mr. Grigsby went to Denver and argued it at the Bar.

The Court: Are you willing for that to be a part of the record?

[fol. 658] Mr. Bailey: We are willing to stipulate that that deposition be filed in this case. His affidavit as to his testimony is also on file.

Mr. Ogden: He was suing Mr. Simler at that time. We want to use him as a witness in this case if we try the case, because we feel like it would be important to do it.

The Court: What about his deposition there, why don't we let his deposition come in?

Mr. Ogden: But he was our adversary when we took his deposition.

Mr. Bailey: It won't change the truth.

Mr. Ogden: We are—he's bound but we don't want to be; he was our adversary.

The Court: If you want to use him as a witness, surely you want to be bound by him.

Mr. Ogden: Not all of it, Judge.

The Court: Just part of it?

Mr. Ogden: If somebody sues you and you have their testimony, you don't want all of it in another case.

The Court: Just use the part that is relevant to the execution of this letter.

Mr. Ogden: May I just say this to the Court, the Court said, "What other witnesses do you have?" And I just mentioned one there.

The Court: All right, what about that? They will let [fol. 659] that in if you will get that deposition up here and only that will go in that is in there with reference to the letter of September 25th, if there is any evidence in there pertinent to the letter of September 25th that may be used. Then you've got it in the record and any other evidence cannot be considered.

Mr. Ogden: I might want to use him for a witness, Judge, too.

The Court: What are you going to prove by him, in addition to that, something different or something more?

Mr. Ogden: Something more.

The Court: Let's see what it would be.

Mr. Ogden: Well, I'll have to get him and talk to him, Judge, and get him up here. I didn't come up here for the purpose of trial.

The Court: I thought you came up here for pretrial and at pretrial you tell what every witness is going to testify to.

Mr. Ogden: I can assume what he is going to testify, some of it. I know what he has testified to in the deposition, but there is some other question.

The Court: What other questions do you want to go into?

Mr. Ogden: You are carrying me a little bit too fast, but I've got it all written down. Look here, Judge, just a [fol. 660] second. I wish you could see what I've got down here, and I wish you would see in this case, here is my file, here, here, and there and over there (indicating). I can't remember, it is just too much.

The Court: Mr. Simler has testified and you want to change his testimony by getting somebody else to change it.

Mr. Ogden: No, I won't change anybody's testimony, Judge, I don't do that.

The Court: Do you want to prove something different from what Mr. Simler has testified to?

Mr. Ogden: I just want to prove what the facts are.

The Court: Do you want to prove something different?

Mr. Ogden: Mr. Britton was associated with Mr. Conner, Judge, in his law firm, and he sued Mr. Simler for a lawyer fee. Mr. Daugherty is the only man that hasn't sued.

The Court: Do you want to use him to substantiate what Mr. Simler has testified to?

Mr. Ogden: And add some to it.

The Court: Add some to it?

Mr. Ogden: That happened when Mr. Simler wasn't there.

[fol. 661] The Court: What did you say the nature of that is?

Mr. Ogden: Judge, I recall I read his deposition the other night at home again to refresh my memory, and I didn't make notes on it, because I didn't anticipate this and I can't tell you the details of it. But, it seems to me from his deposition that it contradicted the testimony to some extent—to a great extent of Mr. Conner.

The Court: If it does, you can put it right in here, just file that deposition. In the meantime, I am going over everything in the record, and if you want to file that, or if you want to take another deposition, you can bring him up here and have him testify before me.

I want to consider all the facts in this case in considering his motion for summary judgment. So if you have other evidence you want to offer, I want to consider all that. I am ready to sustain his motion now just as a matter of law, but I want to go behind that and see what I would do if the second letter didn't exist.

. . . . . .

[fol. 858]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 8008

A. J. SIMLER, Plaintiff,

vs.

LESLIE L. CONNER, Defendant.

Deposition of the Plaintiff, A. J. Simler, Taken in His Own Behalf

APPEARANCES:

Hon. John B. Ogden, 1408-09 Liberty Bank Building, Oklahoma City, Oklahoma, Attorney for Plaintiff.

Messrs. Bailey, McClelland & Collins, 200 Hightower Building, Oklahoma City, Oklahoma, and Hon. James M. Little, 630 Hightower Building, Oklahoma City, Oklahoma, Attorneys for Defendant, by Hon. Robert O. Bailey and Hon. James M. Little.

The deposition of the plaintiff, A. J. Simler, in the above entitled and numbered cause, was taken before me, Scrivner

Mizell, Notary Public, in and for Pulaski County, Arkansas, in Room 908 Pyramid Life Building, in the city of Little Rock, State of Arkansas, beginning at the hour of 10:30 o'clock, a.m., on Monday, the 6th day of July, 1959, in his own behalf, in the above styled cause to be read in evidence in said cause now pending in the United States District Court, Western District of Oklahoma, wherein A. J. Simler is plaintiff and Leslie L. Conner is defendant.

[fol. 870] By Mr. Ogden:

Q. Now, Mr. Simler, I would like to ask you then after [fol. 871] you signed this letter on the 18th day of July, 1952, did you then and I believe you have said, it is repetition, you went to his office and he became your lawyer. Did you have any other conference with him from that time up to September 25th? Did you have conferences with him?

A. Oh, yes.

Q. What was your relationship with him?

A. Oh, yes, several times, yes.

Q. All right, sir. And he represented you during that period of time?

A. Yes, sir.

Q. And was your lawyer?

A. That is right.

Q. Mr. Simler, would you tell the court and jury what, if anything, has been your experience or knowledge in connection with lawyer fees or fixing of lawyer fees? Do you—what has been your experience with that prior to this time before you got in this litigation?

A. Why, I haven't had any.

Q. All right, sir. Then, did you know when you employed Mr. Conner what a reasonable fee was or wasn't a reasonable fee? You put in there a reasonable fee to be fixed by the court?

A. No, but I trusted in the clause in there that we would, if we couldn't agree on a reasonable fee, it should be left up to the county court.

Q. The Court?

[fol. 872] A. Or any other court.

Q. All right, sir.

A. So I figured that that way I would be—have a certain amount of protection.

Q. Now, I go to Exhibit No. 5.

A. Excuse me.

Q. Yes, sir.

A. But I will say that that wasn't my idea. That was Mr. Conner's idea.

Q. To write that letter?

A. To write that protection.

Q. Yes, sir.

A. In there.

Q. All right.

A. If we couldn't agree as to a reasonable fee, I had nothing to do with—about that except to sign it.

Q. He prepared the letter?

A. He prepared the letter.

Q. And you signed it? I will ask you what, if anything, Mr. Conner said to you about this clause that if you couldn't agree as to what a reasonable fee was the court would set it? What did he say about that, why he put that in, for whose protection or what did he say, if anything, just leave it.

A. I don't remember that he said anything, but I thought it was a pretty good idea.

Q. Yes, sir. Did you and he discuss it?

A. I might have. I might have read it over and said that, [fol. 873] that's—that suits me pretty well or something to that effect.

. . . . . .

[fol. 879] Q. All right, sir. Now, will you tell the court why or at whose suggestion you signed Exhibit No. 6 attached to the complaint in this case which is the letter of September 25, 1952? Why did you sign that exhibit is my question, Mr. [fol. 880] Simler, at whose suggestion, if anyone's?

A. Well, of course, it—when you say suggestion—

Q. Well, did you—just tell the court why you signed it. I will put it that way.

A. Well, I signed it.

Mr. Bailey: I think—go ahead. We can object at the trial.

The Witness: I signed it for one reason because they talked in such a manner that it would just be impossible for them to continue the case unless they got a stronger, more assured contract than they had before, that it was a reasonable contract and they didn't think that that was, in other words, sufficient for all the litigation that they were going to have and at the same time they assured me that they had the will case by hiring Mr. Daugherty, that they had the will case finally froze up. Now, I don't say that they hired Mr. Daugherty at this time, but they did right shortly after that and he informed me that he was going to hire some other lawyers, but he didn't tell me who they were, but he said he had a good will case man.

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[fol. 957]

Ordered filed: Stephen S. Chandler, U. S. District Judge.

[Stamp—Filed Jan. 11, 1960, Vera L. Howard, Clerk, U. S. District Court, By Josephine P. Gore, Deputy.]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Before Honorable Sam G. Bratton, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

On Petition for Writ of Mandamus

A. J. SIMLER, Petitioner,

6300 vs.

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, Respondent.

This matter came on regularly for hearing upon the petition of A. J. Simler for a writ of mandamus directed to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, John B. Ogden, Esquire, appearing for petitioner, Robert O. Bailey,

Esquire, appearing for respondent, and was argued to the court.

Treating the petition for a writ of mandamus as an application for leave to file a petition for mandamus, it is now here ordered that said application for leave to file be and the same is hereby granted, and upon consideration of the petition for a writ of mandamus and the files and records filed in support thereof, it is hereby ordered:

1. That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, vs. Leslie L. Conner, defendant, Civil No. 8008, and submit to a jury for determination all disputed issues of fact arising in such action.

[fol. 958] 2. That this order is not to be construed as to have any application to the duty and right of the court to determine what, if any, disputed issues of fact exist in said action, or to the right of the court to dispose of the action summarily if the court, in the exercise of its sound judicial judgment, determines such disposition to be required or proper in law.

Dated January 7, 1960.

Sam G. Bratton, John C. Pickett, David T. Lewis, Circuit Judges.

A true copy. Teste:

Robert B. Cartright, Clerk.

[fol. 970] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Case No. 8008—Civil

A. J. SIMLER, Plaintiff,

vs.

LESLIE L. CONNER, Defendant.

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT—Filed January 12, 1960

Now on this 12th day of January, 1960, plaintiff appearing by his attorney of record, John B. Ogden, and the defendant appearing by his attorney, Robert O. Bailey, and the Court having heard further from counsel on behalf of plaintiff in opposition to defendant's Motion for Summary Judgment, and having further considered said Motion and heretofore carefully reviewed and examined the depositions of plaintiff, defendant and others, the exhibits, transcripts, pre-trial admissions and the entire record in this cause, the Court finds and determines that there is no genuine issue of any material fact in this case and that the Motion of defendant for Summary Judgment should be sustained and judgment entered summarily for the defendant for the reasons:

That there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence in which the parties themselves fixed the percentages of recovery to be realized by defendant as his contingent attorney fee provided in the letter of July 18, 1952, and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would form any basis to set aside or disregard the letter as a part [fol. 971] of the contract between the parties.

That under the terms of the letter of July 18, 1952, properly construed and interpreted, even if the parties

had not thereafter agreed upon the percentages, the contingent fee was to be set by the Court without a jury and the Court finds from the undisputed facts as to the services rendered that a reasonable contingent fee for the services of the defendant in this cause as 50% of the real and personal property recovered after payment of the expense of the litigation.

That all the money and property which the plaintiff has received from the estate of his deceased sister came to him by reason of the legal services rendered by the defendant for the plaintiff upon the contingent fee contract composed of the aforesaid letters and in the contest of the Will and other actions relating thereto, resulting in the Final Decree of the County Court of Oklahoma County in the estate of Birdine Fletcher, deceased, Cause 31726, decreeing plaintiff, A. J. Simler, to be the owner of a complete title to the Northwest Quarter (NW^1_4) of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma with all interest and mineral rights therein and all oil and gas production therefrom; that defendant performed legal services for and was attorney for plaintiff in some 19 separate cases in the State Courts and Supreme Court of Oklahoma, the Federal Courts, the Court of Appeals and the Supreme Court of the United States; that defendant has fully performed his contract and plaintiff has accepted the benefit of defendant's services all with full knowledge that he was proceeding under said contingent fee contract composed of both of the aforesaid letters.

That this Court now has jurisdiction of the parties and subject matter and in construing and applying the contingent attorney fee contract should sustain the defendant's Motion for Summary Judgment for 50% of all [fol. 972] money and property recovered by defendant for plaintiff which includes 50% of all income therefrom less expenses as provided by said contract and that defendant Leslie L. Conner is entitled to summary judgment against plaintiff A. J. Simler as a matter of law.

It Is Therefore Ordered, Adjudged And Decreed by this Court that the Motion for Summary Judgment of

defendant Leslie L. Conner against the plaintiff A. J. Simler allowing a contingent attorney's fee to defendant Leslie L. Conner of fifty percent (50%) of all property, moneys and the income therefrom recovered should be and the same is hereby sustained.

It Is Further Ordered, Adjudged And Decreed that Leslie L. Conner is the owner of an undivided one-half interest in the fee simple title to land, improvements, surface, minerals, mineral rights, and oil and gas production of the Northwest Quarter (NW¼) of Section 34, Township 6 North, Range 10 West in Caddo County, Oklahoma, and by this Order said undivided one half interest in same is hereby conveyed to and vested in Leslie L. Conner.

It Is Further Ordered, Adjudged And Decreed by the Court that the contract between plaintiff A. J. Simler and defendant Leslie L. Conner provided that all expenses, taxes and costs of the litigation should be deducted from the recovery before the division of recovery made between the parties and the Court finds that there is held in the registry of the Clerk of this Court the sum of Ninety Four Thousand Three Hundred Seventy Seven Dollars and One Cent ($94,377.01), which is part of the recovery made by defendant Leslie L. Conner.

It Is Further Ordered, Adjudged And Decreed that each of the parties render to the other before the 27th day of January, 1960, an equitable accounting of the moneys [fol. 973] received and the expenses, taxes and costs which each claim to have disbursed as contemplated by the above contracts, and

It Is Further Ordered that each party shall be reimbursed to the extent he is entitled to be reimbursed and thereafter the balance of the funds in the registry of the Clerk and on hand shall be paid fifty percent (50%) to defendant, Leslie L. Conner, and fifty percent (50%) to plaintiff, A. J. Simler.

Stephen S. Chandler, Judge, United States District Court.

[fol. 973-A] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 8008—Civil

A. J. SIMLER, Plaintiff,

vs.

LESLIE L. CONNER, et al., Defendants.

JUDGMENT—January 12, 1960

Now, on this 12th day of January, 1960, judgment is hereby entered as follows: Deft's. motion for summary judgment sustained allowing contingent attorney's fee of 50% of all property, moneys and income therefrom recovered to defendant, Leslie L. Conner; an undivided ½ interest in fee simple, title to the land, improvements, surface, minerals, mineral rights, and oil and gas production of NW¼-34-6N-10W, Caddo County, Okla., is hereby conveyed to and vested in defendant, Leslie L. Conner; that the contract between plaintiff and defendant, Leslie L. Conner, provided that all expenses, taxes and costs of litigation should be deducted from the recovery before the division of recovery made between the parties; and that the sum of $94,377.01, now in the registry of the Court, is part of the recovery made by defendant, Leslie L. Conner; that each of the parties hereto render to the other before Jan. 27, 1960 an equitable accounting of moneys received, and the expenses, taxes and costs disbursed, each party to be reimbursed to the extent he is entitled; the balance of the funds in the registry of the court to be paid 50% to Leslie L. Conner, defendant, and 50% to plaintiff, A. J. Simler.

Vera L. Howard, Clerk.

[fol. 974] Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit at the September, 1961, Term and the November, 1961, Term.

On the 12th day of June, 1961, the United States Supreme Court remanded this cause for further consideration by this Court in light of *Southard* v. *MacDonald*, 360 P. 2d 940.

(The original files in this cause were returned to the United States District Court for the Western District of Oklahoma.)

Pursuant to the remand by the United States Supreme Court, the following proceedings were had in the United States Court of Appeals for the Tenth Circuit.

[fol. 975]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ORDER DIRECTING CLERK TO MAKE PAYMENT, ETC.—September 29th, 1961

Before Honorable Sam G. Bratton, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard pursuant to a rehearing directed by the Supreme Court of the United States, John B. Ogden, Esquire, appearing for appellant, James M. Little, Esquire, and Phil E. Daugherty, Esquire, appearing for appellee.

Counsel for appellant in open court requested that one-half of the funds held by the clerk of the United States District Court for the Western District of Oklahoma in the registry of the court be released to appellant, A. J. Simler, and counsel for appellee in open court stated there was no objection to such application.

On consideration whereof, it is now here ordered and adjudged by this court that the United States District Court for the Western District of Oklahoma direct its clerk to pay to A. J. Simler one-half of the funds on deposit and held in the registry of the court at this time, upon taking a receipt therefor signed by A. J. Simler, such receipt to be approved by the clerk of the court.

Thereupon this cause was submitted to the court.

[fol. 976]

IN UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6339—September Term, 1961

A. J. SIMLER, Appellant,

v.

LESLIE L. CONNER, Appellee.

Appeal from the United States District Court for the Western District of Oklahoma

---

OPINION—October 12, 1961

John B. Ogden, Oklahoma City, Oklahoma, (Jack M. Highley, Oklahoma City, Oklahoma, with him on the brief), for Appellant.

James M. Little and Phil E. Daugherty, Oklahoma City, Oklahoma, (Leslie L. Conner, Oklahoma City, Oklahoma, with them on the brief), for Appellee.

Before Bratton, Pickett and Lewis, Circuit Judges.

Per Curiam (on reconsideration).

[fol. 977] When we originally considered this declaratory judgment action in which determinations of the validity of an attorney's contingent fee contract and of the reasonableness of an attorney's fee in a will-contest case are sought, we held that the plaintiff was entitled to a jury trial on the issues of fact. *Simler* v. *Conner*, 282 F. 2d 382. Thereafter the United States Supreme Court vacated our judgment and remanded the case "for reconsideration in the light of *Southard* v. *MacDonald*, 360 P.2d 940." *Conner* v. *Simler*, 367 U.S. 486. In the Southard case the Supreme Court of Oklahoma held:

"Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter." *Southard v. MacDonald*, ——Okl. ——, 360 P.2d 940, 941 (syllabus by the court).

Unless the contingent fee contract in this case is held to be invalid the value of the services on a quantum meruit basis does not arise, and Conner is entitled to one-half of [fol. 978] any recovery resulting from the legal services rendered in connection with the will contest matter. The basic relief sought is the cancellation of the contract; therefore the action is purely equitable in nature, and should be determined by the court without a jury.

As to the appropriateness of the trial court's summary judgment our views remain as expressed in the former opinion.

Reversed and remanded for trial without a jury.

LEWIS, Circuit Judge, concurring.

I concur. The Supreme Court of the United States in remanding this case for further consideration in the light of Southard v. MacDonald, 360 P.2d 940 makes it manifest that the issues are dependent upon the application of state law. And the opinion of the Supreme Court of Oklahoma in Southard indicates that there is no factual element of reasonableness necessarily inherent in the searching scrutiny required in determining the validity of a contingent fee contract made between attorney and client as authorized by Title 5, O.S.A. §7. I interpret Southard as negativing the [fol. 979] earlier language contained in Haunstein v. McCalister, 46 P.2d 552, wherein it was stated that an attorney, having entered into a contingent fee contract with his client, shown to be free from fraud, still "is not entitled to recover more than reasonable compensation for his services, *regardless of the contract price*." (Emphasis added.) In Southard it is said, 360 P.2d 940 at 945-6: "Since we hold that the deed and contract are binding, there is no necessity to discuss the value of the service on quantum

merit." And it follows, as stated in the main opinion, that the issue of the validity of the contract is one for the court to determine and under applicable state law. It also follows, since the trial court has summarily determined that the subject contract is valid and binding, that our present review must search the correctness of that holding.

The trial court rendered summary judgment after reading the depositions of the plaintiff, defendant and a third person present when the questioned contract was executed. The testimony therein contained shows a substantial agreement of the witnesses as to the circumstances preceding and attending the execution of the contract. Agreement upon these circumstances, however, does not preclude the finding [fol. 980] of varying but permissible inferences from those circumstances. To find an ultimate fact by this method is trial by affidavit and not proper under Rule 56. I agree that the case should be remanded for trial before the court.

[fol. 981]

In United States Court of Appeals

For the Tenth Circuit

Judgment—October 12th, 1961

Before Honorable Sam G. Bratton, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for trial without a jury, and that A. J. Sinler, appellant, have and recover of and from Leslie L. Conner, appellee, his costs herein.

In United States Court of Appeals

For the Tenth Circuit

Order Extending Time for Filing Petition for Rehearing—October 27th, 1961

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam G. Bratton, Circuit Judge.

On application of appellant, it is ordered that the time within which appellant may file a petition for rehearing in this cause is hereby extended to and including November 12, 1961.

[fol. 982] Petition for rehearing covering 21 pages filed November 13, 1961 omitted from this print. It was denied, and nothing more by order November 18, 1961.

[fol. 983]

In United States Court of Appeals

For the Tenth Circuit

Before Honorable Sam G. Bratton, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

Order Denying Petition for Rehearing—November 18th, 1961

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

On December 4, 1961, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

[fol. 984] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 985]

SUPREME COURT OF THE UNITED STATES

No. 639—October Term, 1961

A. J. SIMLER, Petitioner,

vs.

LESLIE L. CONNER

ORDER ALLOWING CERTIORARI—January 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. [redacted] 59

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN B. OGDEN,
1408-9 Liberty Nat'l Bank Building,
Oklahoma City, Oklahoma,
Attorney for Appellant.

Of Counsel:
JACK M. HIGHLEY,
Mutual Savings Building,
Oklahoma City, Oklahoma,

December, 1961.

UTTERBACK TYPESETTING CO. 10 SO WALKER, OKLAHOMA CITY. PH. CR 9-8750

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In the
Supreme Court of the United States
OCTOBER TERM, 1961

No. .....

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now the above named petitioner and hereby petitions this Honorable Court to grant a writ of certiorari herein and review the opinion of the United States Court of Appeals for the Tenth Circuit, which opinion was rendered on October 12, 1961, and was rendered on reconsideration after direction by this Court to reconsider its former opinion. The first opinion rendered by the Court of Appeals for the Tenth Circuit in regard to the matters involved herein is found in 282 F.2d 382. Thereafter, this Court granted certiorari in said cause on petition for rehearing and rendered the following opinion:

"IN THE SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1960

"No. 685

"Leslie L. Conner, Petitioner,

v.

"A. J. Simler, Respondent.

"The petition for rehearing is granted. The order entered March 20, 1961, denying the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The judgment is vacated and the case is remanded to the Court of Appeals for reconsideration in the light of Southard v. MacDonald, 360 P.2d 940.

"THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from vacation of the Court of Appeals judgment which held that the respondent Simler was entitled to have the facts of his case in the United States District Court determined by a jury as we believe is required by Rule 38 of the Federal Rules of Civil Procedure, our prior decisions and the Seventh Amendment to the Constitution of the United States."

On reconsideration as therein directed, the opinion of the Circuit Court of Appeals in effect denied to the petitioner herein a jury trial, and said opinion being rendered on October 12, 1961 by the Court of Appeals is as follows:

"When we originally considered this declaratory judgment action in which determinations of the validity of an attorney's contingent fee contract and of the reasonableness of an attorney's fee in a will-contest

case are sought, we held that the plaintiff was entitled to a jury trial on the issues of fact. Simler v. Conner, 282 F.2d 382. Thereafter the United States Supreme Court vacated our judgment and remanded the case 'for consideration in the light of Southard v. MacDonald, 360 P.2d 940.' Conner v. Simler, 367 U.S. 486. In the Southard case the Supreme Court of Oklahoma held:

> 'Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter.' Southard v. MacDonald, Okl. , 360 P.2d 940, 941 (syllabus by the court).

"Unless the contingent fee contract in this case is held to be invalid the value of the services on a quantum meruit basis does not arise, and Conner is entitled to one-half of any recovery resulting from the legal services rendered in connection with the will contest matter. The basic relief sought is the cancellation of the contract; therefore the action is purely equitable in nature, and should be determined by the court without a jury.

"As to the appropriateness of the trial court's summary judgment our views remain as expressed in the former opinion.

"REVERSED and REMANDED for trial without a jury.

"LEWIS, Circuit Judge, concurring.

"I concur. The Supreme Court of the United States in remanding this case for further consideration in the light of Southard v. MacDonald, 360 P.2d 940 makes it manifest that the issues are dependent upon the application of state law. And the opinion of the

Supreme Court of Oklahoma in Southard indicates that there is no factual element of reasonableness necessarily inherent in the searching scrutiny required in determining the validity of a contingent fee contract made between attorney and client as authorized by Title 5, O.S.A. Sec. 7. I interpret Southard as negativing the earlier language contained in Haunstein v. McAllister, 46 P.2d 552, wherein it was stated that an attorney, having entered into a contingent fee contract with his client, shown to be free from fraud, still 'is not entitled to recover more than reasonable compensation for his services, *regardless of the contract price.*" (Emphasis added.) In Southard it is said, 360 P.2d 940 at 945-6: 'Since we hold that the deed and contract are binding, there is no necessity to discuss the value of the service on quantum meruit.' And it follows, as stated in the main opinion, that the issue of the validity of the contract is one for the court to determine and under applicable state law. It also follows, since the trial court has summarily determined that the subject contract is valid and binding, that our present holding must search the correctness of that holding.

"The trial court rendered summary judgment after reading the depositions of the plaintiff, defendant and a third person present when the questioned contract was executed. The testimony therein contained shows a substantial agreement of the witnesses as to the circumstances preceding and attending the execution of the contract. Agreement upon these circumstances, however, does not preclude the finding of varying but permissible inferences from those circumstances. To find an ultimate fact by this method is trial by affidavit and not proper under Rule 56. I agree that the case should be remanded for trial before the court."

After the rendition of said opinion, the petitioner herein filed petition for rehearing which was denied by the Court of Appeals on November 18, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Should the question of right to trial by jury be determined by the Federal Rules of Civil Procedure and the Laws and Constitution of the United States in a diversity case, or should such right be determined by the law of the State in which the case is being tried?

It will be noted from the first opinion of the Tenth Circuit, 282 F.2d 382, that the Tenth Circuit held that this case should be tried to a jury. The appellee, Leslie L. Conner, filed a petition for certiorari in this Court, which was denied, and on petition for rehearing this Court directed the Court of Appeals to reconsider its opinion in the light of *Southard* v. *MacDonald*, 360 P.2d 940. On reconsideration thereof, the Circuit Court held that in view of *Southard* v. *MacDonald*, *supra*, from the Oklahoma Supreme Court that the petitioner here, appellant in the Circuit Court, was not entitled to a jury trial. Thus, we present to this Court the question as to whether or not federal law or state law should be considered in determining whether or not a litigant in a diversity case is entitled to a jury trial. We feel that in a case in the United States Court under the Constitution of the United States, it is mandatory that a jury trial be granted in accordance with the Constitution of the United States and

that the state law does not control in determining such question.

For emphasis sake we quote the Seventh Amendment as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law."

Rule 38 of the Rules of Civil Procedure is as follows:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issue. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him

of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Petitioner calls to the attention of this Court the following cases:

In the case of *Allen* v. *Matson Navigation Company*, 255 F.2d 273, the Ninth Circuit, in Syllabus 10, said:

> "The kind of jury trial to which parties are entitled in federal courts under federal rules is that preserved by Seventh Amendment, to which doctrine of Erie v. Tompkins is subservient. Fed. Rules Civil Procedure rules 38, 39, 28 USCA; U.S.C.A. Const. Amend. 7."

We also quote from the body of the opinion as follows:

> "We also note that while circumstances would not in our opinion alter results here, yet the sufficiency of certain evidence to raise a question of fact for jury should not be controlled by state law. 5 Moore's Fed. Practice 2d Edition Article 38.10 page 102."

See also to the same effect *Pogue* v. *Great Atlantic & Pacific Tea Company*, 5 Cir., 242 F.2d 575, 582; *Wright* v. *Paramount-Richards Theatres*, 5 Cir., 198 F.2d 303, 305; *Reuter* v. *Eastern Air Lines*, 5 Cir., 226 F.2d 443, 445; *Reynolds* v. *Pegler*, 2 Cir., 223 F.2d 429, 433, 434. An examination of these cases, we think will convince the Court that these circuits are convinced that state law has nothing to do with determining right of trial by jury or kind of jury trial to which a litigant is entitled.

In the case of *Dick* v. *New York Life Insurance Company*, 79 Sup. Ct. 921, the Supreme Court said:

"A Decision as to which standard should be applied can well be left to another case which question is briefed and argued."

In the case of *Wright* v. *Paramount-Richards Theatres*, cited *supra*, the Fifth Circuit in Syllabus 1 said:

"While federal Court of Appeals, as well as federal District court for Louisiana district, is just another tribunal for interpreting and applying substantive law of Louisiana in personal injury actions of which such courts have jurisdiction solely because of diversity of parties' citizenship, federal courts are bound by federal constitutional amendment guaranteeing jury trial and providing that no fact tried by jury shall be re-examined in federal court otherwise than according to common law rules, which are not recognized by Louisiana, under civil law of which appellate court gives judgment on facts without jury's intervention. U.S.C.A. Const. Amend. 7."

In *Pogue* v. *Great Atlantic and Pacific Tea Company*, 242 F.2d 575, the Fifth Circuit in Syllabus 4 said:

"The kind of jury trial to which parties to a Florida negligence action tried in a federal court were entitled under rules of civil procedure was that preserved by Seventh Amendment to the Constitution. Fed. Rules Civ. Proc. rules 38, 39, 28 U.S.C.A., U.S.C.A. Const. Amend. 7."

In the case of *Bowie* v. *Sorrell*, 209 F.2d 49, the Court said in Syllabi 3 and 4 as follows:

"(3). Where separate trial was ordered on issue of validity of release pleaded by defendant as defense to tort action and attacked by plaintiff as being invalid because of fraud, plaintiff was entitled to jury

trial on such issue. Fed. Rules Civ. Proc. rule 42 (b), 28 U.S.C.A.

"(4). Question whether Plaintiff in tort action was entitled to jury trial in separate trial on issue of validity of release relied upon by defendant and attacked by plaintiff as being invalid because of fraud would be determined by federal law, not by state law. Fed. Rules Civ. Proc. rule 42 (b), 28 U.S.C.A."

In the case of *Order of United Commercial Travelers of America* v. *Duncan* (C.A. 6th, 1955), 221 F.2d 703, the Court states:

"The Court did not err in submitting this question to the juries. It was a procedural question governed by the law of the forum. Restatement Conflict of Laws, Art. 585. The law of the forum determines whether an issue of fact shall be tried by the Court or by a jury. Restatement Conflict of Laws, Art. 594."

In *Beacon Theatres, Inc.* v. *The Hon. Harry C. Westover, Judge of the United States District Court of the Southern District of California*, 79 Sup. Ct. 948, 359 U.S. 500, the Court held in Syllabus 4 as follows:

"The Declaratory Judgment Act preserves right to jury trial for both parties. 28 U.S.C.A., Secs. 2201, 2202."

and in Syllabus 22 as follows:

"In federal courts, right to jury trial cannot be dispensed with, except by consent of parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of demand for equitable relief in aid of legal action, or during its pendency. Fed. Rules Civ. Proc. rules 1, 2, 18, 39 (a), 28 U.S.C.A.; 28 U.S.C.A., Sec. 2072; U.S.C.A., Const. Amend. 7."

In the case of *Jackson D. Magenau, Administrator v. Aetna Freight Lines, Inc.*, 79 Sup. Ct. Rep., page 1184, 360 U.S. 308, Syllabi 3 and 4 are as follows:

"Under federal judicial system, determination of disputed questions of fact in civil common-law action is for jury.

"Where state practice rule requiring disputed factual issue to be tried to court is not an integral part of special relationship created by statute, federal court, in diversity case, should not follow state rule."

Petitioner calls attention to Rule 19, Supreme Court of the United States in part as follows:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * * * * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state of territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; * * *"

This petitioner shows to this Honorable Court that since there are differences of opinions and views among the courts of appeals in the construction and application of the Rules of Civil Procedure and the Federal Constitu-

tion, your petitioner is entitled to a determination by this Court of the question herein involved, namely, whether the right to a jury trial in a diversity case in a United States court should be determined by state or federal law. This Court has repeatedly held that where there is a conflict between different circuits in the United States construing a federal law or the Constitution of the United States, that in that event, this Court will grant certiorari and determine the question involved, and we call to this Court's attention the case of *Boehm* v. *Commissioner of Internal Revenue*, 326 U.S. 287, 291, 66 S. Ct. 120, 90 L. Ed. 78, wherein this Court used this language:

> "* * * We granted certiorari because of an alleged inconsistency with Smith v. Helvering, 78 U.S. App. D.C. 342, 141 F.2d 529. * * *"

In *Hercules Gasoline Co., Inc.* v. *Commissioner of Internal Revenue*, 326 U.S. 425, 66 S. Ct. 222, in the body of the opinion this Court said:

> "We granted certiorari, 326 U.S. 701, 66 S.Ct. 23, because of conflicting determinations by the Circuit Courts as to the scop f these credit provisions."

In *Commissioner of Internal Revenue* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, we quote from the body of the opinion:

> "The Commissioner disallowed the deductions, which action was sustained by the Tax Court. But the Fifth Circuit Court of Appeals reversed the Tax Court's judgment, 148 F.2d 163, and we granted certiorari because of a conflict between the decision below and

that reached by the Fourth Circuit Court of Appeals in Barnhill v. Commissioner, 148 F.2d 913."

In the case of *Oklahoma Press Pub. Co. v. Walling, Adm'r; Wage and Hour Division, U. S. Department of Labor,* and *News Printing Co., Inc. v. Same,* 327 U.S. 186, 66 S. Ct. 494, we quote from the body of the opinion:

"Because of the importance of the issues for administration of the Act and also on account of the differences in the grounds for the two decisions, as well as between them and decisions from other circuits, certiorari was granted in both cases."

In Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States," 1951, the author states in Article 322, page 629:

"Where the decision of the Court of Appeals sought to be reviewed by certiorari directy conflicts, upon a question of federal law, with the decision of another Court of Appeals on the same question, the Supreme Court grants certiorari as of course; and irrespective of the importance of the question of law involved."

Thereunder are cited many cases, and on page 633 of the same authority and the same article, the author states further:

"Differences of view among the Courts of Appeals in the construction and application of federal statutes are regarded as requiring the interposition of the Supreme Court by certiorari under the direct conflict rule."

There are many cases cited hereunder, and under the Rules of this Court the petitioner shows that cetriorari should be

granted, and that there is a substantial federal and constitutional question involved herein, and by virtue of the conflict, your petitioner is entitled to a writ of certiorari, and upon the granting of certiorari and reviewing the cause, he is entitled to have the opinion of the United States Court of Appeals for the Tenth Circuit reversed insofar as it denies to your petitioner a jury trial, and is entitled to an order directing a jury trial be granted as provided by the Constitution of the United States and Rule 38 of the Federal Rules of Civil Procedure.

Your petitioner now shows to this Honorable Court that he has not presented to this Court herein a full statement of the factual situation or facts in this case by reason of the fact that the opinions set out in this petition and rendered by the Circuit Court set forth the controversy, but your petitioner wishes to call to the attention of this Court the fact that this is a suit wherein your petitioner sued the respondent in the United States District Court for the Western District of Oklahoma asking the court to determine by means of a declaratory judgment whether or not this petitioner owed the respondent any additional sums as attorney fees, and if he did owe additional sums as attorney fees to the respondent, then to determine the amount thereof, and that such controversy and the issues as made by the pleadings are shown herein by a copy of the following, namely, the original Complaint filed in April, 1958, the Amended Complaint filed on or about August 6, 1958, and a further Amendment filed on or about the 15th day of August, 1958, the Answer and Counter-claim of defendant Leslie L. Conner, omitting the exhibits filed on or about the

23rd day of September, 1958, the Reply to Counter-claim of defendant filed in said United States District Court on or about the 14th day of May, 1959, and your petitioner further shows that he attaches to this Petition an Appendix containing a true and correct copy of the pleadings set forth above which fully and completely show the issues involved and the pleadings of the parties omitting the exhibits in the United States District Court for the Western District of Oklahoma.

SECOND REASON FOR GRANTING THE WRIT

Questions Presented

The United States Court of Appeals, Tenth Circuit, in its opinion misconstrued the opinion of *Southard* v. *MacDonald*, 360 P.2d 940, and failed to make the distinction as to the facts therein set forth.

We wish to call to the Court's attention the fact that, under Oklahoma law the petitioner is entitled to a jury trial. In determining the difference in the factual situations it is necessary to fully understand that in the *Southard* v. *MacDonald* case the contract was entered into before the relationship of attorney and client existed. In the case of *Simler* v. *Conner*, the case at bar, the letter of September 25, 1952, was written by Mr. Conner, signed by Mr. Simler after the relationship of attorney and client existed. The relationship of attorney and client began on July 18, 1952, when Mr. Conner prepared a letter of employment and secured Mr. Simler's signature thereto and began to repre-

sent Mr. Simler. Consequently, on the 25th day of September, 1952, when the second letter, which is the letter involved in this litigation, was prepared by Mr. Conner and signed by Mr. Simler, Mr. Conner was Mr. Simler's lawyer and could not take any advantage of him, and the Supreme Court of Oklahoma has passed squarely and completely upon a similar question in the case of *Haunstein* v. *McAllister*, 172 Okla. 613, 46 P.2d beginning on page 552, and we quote:

> "It is a well established rule of law that contracts between attorney and client to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, and *EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE.*" (Emphasis supplied.)

This opinion was cited in *Southard* v. *MacDonald* with approval. Consequently, since the letter of September 25, 1952, was prepared by Mr. Conner and signed by Mr. Simler when the relationship of attorney and client existed, Mr. Conner is not entitled to recover more than reasonable compensation for his services, regardless of such letter, and your petitioner believes that the Court of Appeals for the Tenth Circuit has apparently assumed that the case of *Southard* v. *MacDonald* nullified or overruled *Haunstein* v. *McAllister*, *supra*, and therefore rendered an opinion which misconstrues the law of Oklahoma.

Your petitioner further shows to this Honorable Court that the Supreme Court of Oklahoma in the case of *Wolfe v. Campbell*, 107 Okla. 112, 230 Pac. 506, held that the "issue as to what is reasonable attorney's fee is for the jury."

Your petitioner shows to this Honorable Court that under the law of Oklahoma, before the relationship of attorney and client exists, an attorney may contract with his client on the same basis as any other contract, but after such relationship exists, an attorney cannot contract with his client for more than reasonable compensation, regardless of contract price, and the letter dated July 18, 1952, prepared by Mr. Conner and signed by Mr. Simler provides that Mr. Conner should be paid a reasonable fee for his services, and the petitioner is desirous of paying a reasonable fee, if he has not already paid a reasonable fee, and he is entitled to have such matter determined by a jury under the law of the State of Oklahoma as well as the Constitution of the United States and the Federal Rules of Civil Procedure, and the Constitution of the State of Oklahoma.

Your petitioner shows that Article I of the Constitution of Oklahoma provides as follows:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article II, Section 19, is in part as follows:

> "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; * * *."

CONCLUSION

WHEREFORE, your petitioner prays that certiorari be granted and that this cause be reversed, and that the United States Court of Appeals Tenth Circuit be ordered and directed to grant a jury trial, or that the United States District Court for the Western District of Oklahoma be ordered and directed to grant a jury trial to this petitioner.

Respectfully submitted,

JOHN B. OGDEN,
1408-9 Liberty Nat'l Bank Building,
Oklahoma City, Oklahoma,
Attorney for Appellant.

Of Counsel:
JACK M. HIGHLEY,
Mutual Savings Building,
Oklahoma City, Oklahoma,

December, 1961.

CERTIFICATE

I certify that I mailed a true and correct copy of this PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, to Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma, and to Phil Daugherty, Fidelity National Bank Building, Oklahoma City, Oklahoma, by depositing the same in the United States mail with sufficient postage attached on this the day of December, 1961.

.....

JOHN B. OGDEN

APPENDIX

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil.

COMPLAINT

Comes now the above named plaintiff and shows to this Honorable Court:

1. That he is a resident, citizen and inhabitant of the State of Arkansas residing in North Little Rock, Arkansas. That the defendant herein is a resident, citizen and inhabitant of Oklahoma County, State of Oklahoma, and that there is in controversy herein a sum in excess of $3,000.00, and by virtue thereof, this Court has jurisdiction herein.

2. This plaintiff further shows that this is an action for a declaratory judgment pursuant to 28 U.S.C. Art. 2201 for the purpose of determining questions of actual controversy between the parties as hereinafter more fully appears.

3. This plaintiff shows to this Honorable Court that heretofore and on or about the day of July, 1952 this plaintiff herein employed the defendant, who is an attorney at law and who was at such time a duly licensed and practicing attorney, to represent this plaintiff in certain litigation in the contest of a will made by one, Birdine Fletcher, and in adjudicating the rights of this plaintiff in and to said estate, and that at such time this plaintiff and said defendant agreed that this plaintiff would pay to the said defendant a reasonable sum for his attorney's

fees in the handling of said matter for and on behalf of said plaintiff herein as his attorney.

4. That said attorney and this plaintiff conducted litigation concerning said matter through the Supreme Court of the State of Oklahoma on two different occasions and through the United States District Court at various times, with all of which the defendant is familiar, and in the United States Court of Appeals, Tenth Circuit, and the United States Supreme Court, and that said litigation has now been settled.

5. That the said defendant herein employed one, James E. Grigsby as an attorney to assist the said defendant and agreed to pay the said James E. Grigsby 28% of the attorney's fees which would be due to the said defendant as such attorney. That the said defendant, Leslie L. Conner, also employed Phil E. Daugherty, another attorney, to assist the said defendant in said litigation and agreed to pay said Phil E. Daugherty for his services out of such compensation as the defendant would be entitled to in said cause.

6. This plaintiff further shows to this Honorable Court that one, Arnold Britton, was associated with the said Leslie L. Conner in his office at such time and that the said Leslie L. Conner was liable to the said Arnold Britton, if anyone was liable to him, for any fees to which Arnold Britton would be entitled to, but this plaintiff shows that his contract of employment was with the said Leslie L. Conner.

7. This plaintiff shows that after said litigation had been carried on through the various courts, the said James E. Grigsby demanded an attorney's fee and filed suit in the United States District Court for the Western District of Oklahoma against this plaintiff and caused said property to be attached and oil runs withheld, and that this plaintiff was forced to and did employ John B. Ogden as his attorney to represent him in such matter and to represent

him in other matters connected with said estate and protecting the rights of this plaintiff.

8. This plaintiff shows to this Honorable Court that he has paid out the following amounts as attorneys fees:

(a) The sum of $46,000.00 to Fred Suits, Mary Weiss and the firm of Dudley, Dudley & Dudley, which sum was paid on order of the County Court of Oklahoma County, Oklahoma, such sum being paid to said attorneys for representing the executor of said estate of Birdine Fletcher, deceased, who was the sister of this plaintiff.

(b) That in addition thereto, he has paid to Leslie L. Conner the sum of $24,000.00.

(c) That he has paid to James E. Grigsby, one of the attorneys employed by the said Leslie L. Conner, the sum of $12,800.00.

(d) That he has paid to John B. Ogden, the attorney employed by this plaintiff, the sum of $7,500.00.

That he has paid a total of $90,300.00 for attorney's fees.

9. This plaintiff now shows to this Honorable Court that the defendant, Leslie L. Conner, is claiming against this plaintiff additional attorney's fees in excess of $3,000.00, and that this plaintiff is entitled to have this Court determine said controversy between this plaintiff and the said Leslie L. Conner, and determine whether or not the said Leslie L. Conner is entitled to any additional fees, and if so, what amount.

WHEREFORE, this plaintiff prays that this Court adjudge whether or not this plaintiff is indebted to the defendant in any sum or sums whatsoever, and if so, to what extent or what amount, for costs of this action, and for

such other and further relief as may appear to this Court just, right and proper in the premises.

JOHN B. OGDEN,
Attorney for Plaintiff,
1408-9 Liberty Bank Bldg.,
Oklahoma City, Oklahoma.

Demand for Jury Trial

Comes now the above named plaintiff and hereby demands and requests a jury trial of this cause. Dated this the day of April, 1958.

JOHN B. OGDEN,
Attorney for Plaintiff.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. . Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil.

AMENDMENT TO COMPLAINT

Comes now the plaintiff and in compliance with the letter, direction and order of this Court dated August 1, 1958 wherein this Court stated:

"* * * defendant's motion for more definite statement is hereby sustained. Within 20 days the plaintiff should furnish the instruments requested by the defendant and attach them to the complaint."

The plaintiff herein hereby amends his complaint as follows:

1. This plaintiff shows to this Honorable Court that on or about July 18, 1952 the defendant was employed as alleged in paragraph 3 of the complaint, and that at said

time and as evidence of said employment Leslie L. Conner, the defendant herein, prepared in his office a letter dated July 18, 1952, which letter is in words and figures as follows, to-wit:

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: BIRDINE FLETCHER ESTATE
COUNTY COURT, OKLAHOMA
COUNTY, OKLAHOMA.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

If the matter is not, won, compromised or settled you are not to charge us a fee.

Yours truly,
/s/ A. J. Simler
A. J. Simler, for himself and his children."

That although the defendant Leslie L. Conner did not sign said letter he prepared the same and requested and directed the plaintiff herein to sign the same, thereby employing the said defendant as plaintiff's attorney and at that time the defendant Leslie L. Conner became and was the attorney of the plaintiff herein, A. J. Simler, and the relationship of attorney and client thereby and thereafter existed. That thereafter the said Leslie L. Conner did represent the said plaintiff in said matter therein referred to, and that the said Leslie L. Conner employed James E. Grigsby, the attorney mentioned in the complaint herein as pled in paragraph 5 of the original complaint, and also employed the said Phil E. Daugherty as heretofore pled.

2. This plaintiff shows to this Honorable Court that after said litigation had proceeded for some time and the said Leslie L. Conner was representing the plaintiff herein, that the plaintiff was called to the office of Leslie L. Conner, the defendant herein, and was there advised by the said Leslie L. Conner that the said Conner desired that the plaintiff herein sign another letter, and that the said Simler, plaintiff herein, refused to so do stating to the said Conner that he had already signed a letter of employment and that he did not wish to change the same in any manner whatsoever, but that the said Leslie L. Conner, defendant herein, told the said plaintiff it was necessary for him to sign another letter and insisted that the said A. J. Simler sign another letter which the said defendant herein, Conner, had prepared. That over the protest and objection and through the persuasion of the said defendant

herein, the said attorney persuaded, induced and procured the signature of the said A. J. Simler on said second letter, which was dated September 25, 1952, and which said letter was not signed by the said Conner but only by the said Simler, and for which there was absolutely no consideration of any kind whatsoever. Said letter last mentioned dated September 25, 1952 is in words and figures as follows, to-wit:

"Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

Dear Sir:—

With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.
33⅓% of the amount recovered if the case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,
s A. J. Simler
A. J. SIMLER"

This plaintiff shows that the same does not constitute a contract of employment for the reason that there was no

consideration whatsoever therefor, and for the further reason that the relationship of attorney and client existed between the plaintiff and the defendant and that the said plaintiff herein had no advice from anyone other than the said defendant herein, Leslie L. Conner, and that the said Leslie L. Conner then and there being and already having been employed as the attorney for the said plaintiff herein he did not have the right or authority to induce or procure another agreement or letter and that the same is and was utterly void, and that the same was procured by the said defendant herein by persuasion, coercion and on the advice of the said defendant herein, Leslie L. Conner, the attorney for A. J. Simler, and for the purpose of gaining or attempting to gain an unfair advantage over the said A. J. Simler. This plaintiff further shows to this Honorable Court that the said Conner did not permit the said A. J. Simler to seek outside counsel or advice and did not advise him of his rights with reference thereto, but insisted that he sign said letter before leaving the office of the said Leslie L. Conner.

3. That by virtue of all the above, the said second letter is absolutely void, of no force and effect and is not entitled to be considered in evidence or in any other manner in this Court, and this plaintiff shows that he is pleading the same and setting it out not for the purpose of being bound thereby, but solely because he was ordered and directed to so attach said letter or plead the same under and by virtue of the order of this Court, being a letter dated August 1, 1958, which letter is in words and figures as follows, to-wit:

"Although the plaintiff has alleged some matter which are not directly relevant, the court herein overrules the defendant's motion to strike, inasmuch as such irrelevant allegations will not work to the prejudice of the defendant.

"However, defendant's motion for more definite statement is hereby sustained. Within 20 days the plaintiff should furnish the instruments requested by the defendant and attach them to the complaint."

And that is the only reason he pleads or attaches a copy of said letter, and specifically pleading that he is not bound and was not bound thereby, and the same is absolutely void for the reasons hereinabove set forth.

4. This plaintiff further shows that under the laws of the State of Oklahoma the defendant Leslie L. Conner did not have the right to enter into a new contract with his client, the plaintiff herein, and that the said Leslie L. Conner did not have the right to change or modify the contract of employment in any manner whatsoever after he was employed by the said plaintiff A. J. Simler.

5. This plaintiff shows that under the circumstances hereinabove pled and shown, that the said letter dated September 25, 1952 was therefore secured by fraud and misrepresentation and for such reason is void.

WHEREFORE having fully complied with the Order of this Court in amending said complaint, the plaintiff prays that he have the relief set forth in his original complaint herein.

JOHN B. OGDEN
Attorney for Plaintiff
1408 Liberty Bank Building
Oklahoma City, Oklahoma

I certify that I mailed a true and correct copy of the Amendment to Complaint to Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma, on this the 6th day of August, 1958.

JOHN B. OGDEN

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil.

AMENDMENT TO COMPLAINT

Comes now the plaintiff and in compliance with the Order of this Court entered on August 1, 1958, wherein the Court sustained the defendant's motion for more definite statement, this plaintiff in compliance with the Order of the Court hereby amends the complaint filed herein, and shows that on or about the 18th day of July, 1952 the defendant was employed as alleged in paragraph 3 of the complaint, and that at said time and as evidence of said employment, Leslie L. Conner, the defendant herein, prepared in his office a letter dated July 18, 1952, which letter is in words and figures as follows, to-wit:

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: Birdine Fletcher Estate
County Court, Oklahoma
County, Oklahoma

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from

court reporters: prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand this will run in the approximate neighborhood of $1,000.00.

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

If the matter is not won, compromised or settled you are not to charge us a fee.

Yours truly,

/s/ A. J. Simler
A. J. Simler, for himself
and his children.

That although the defendant Leslie L. Conner did not sign said letter, he prepared the same and requested and directed the plaintiff herein to sign the same, thereby employing the said defendant as plaintiff's attorney and at that time the defendant Leslie L. Conner became and was the attorney of the plaintiff herein, A. J. Simler, and the relationship of attorney and client thereby and thereafter existed. That thereafter the said Leslie L. Conner did represent the said plaintiff in said matter therein referred to, and that the said Leslie L. Conner employed James E. Grigsby, the attorney mentioned in the complaint herein as pled in paragraph 5 of the original complaint, and also employed the said Phil E. Daugherty as heretofore pled.

WHEREFORE, plaintiff prays for judgment as in his original complaint set out herein.

JOHN B. OGDEN
Attorney for Plaintiff
1408-9 Liberty Bank Building
Oklahoma City, Oklahoma

I certify that I mailed a true and correct copy of this Amendment to Complaint to Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma, on this the 15th day of August, 1958.

JOHN B. OGDEN

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil.

ANSWER AND COUNTERCLAIM OF DEFENDANT LESLIE L. CONNER.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil.

ANSWER AND COUNTERCLAIM

The defendant, Leslie L. Conner, for Answer to the Complaint and Amendment to the Complaint states:

—1—

The Complaint and Amendment fail to state a claim against Defendant upon which relief can be granted and Defendant moves the Court to dismiss the complaint.

—2—

Defendant admits the allegation in paragraph one of the Complaint.

—3—

Defendant denies the allegation contained in paragraph two of the Complaint.

—4—

As to paragraph three defendant admits that he is a lawyer, licensed to and has been admitted to practice of law for the past thirty-three years and is admitted to practice before the Supreme Court of the United States: The Court of Appeals: Tenth Circuit: The Supreme Court of the State of Oklahoma and all Federal District Courts in Oklahoma and other bureaus and commissions.

Defendant, Leslie L. Conner, admits that the plaintiff, Mr. A. J. Simler, employed him on a written contingent fee contract, when Mr. A. J. Simler had been *"left $1.00 and no more"* in a Will signed by his sister, Birdine Fletcher. That defendant accepted such employment on a contingent fee contract, copies of which are attached hereto as exhibits of Leslie L. Conner, defendant, and Counter-claimant.

That plaintiff and defendant on September 25, 1952, because of other proposed litigation agreed on clarification of the word "reasonable fee" in said contingent fee contract of July 15, 1952. The litigation was continuous and was carried through the County Court, District Court and Supreme Court of Oklahoma; the Federal Courts in Oklahoma; and through the Court of Appeals, Tenth Circuit; and was three times appealed to the Supreme Court of the United States. *During all this litigation plaintiff was represented by this defendant, Leslie L. Conner under his contingent fee agreement with plaintiff Mr. A. J. Simler,* to be his lawyer in all this litigation and has ended by defendant, Leslie L. Conner, winning for Mr. A. J. Simler,

the plaintiff, a 160-acre oil producing farm with all minerals and mineral rights located in the Cement Field and described as:

NW¼ of Section 34 in Township 6 North Range 10 West of the I. M. in Caddo County, Oklahoma.

which is producing oil at the rate of over $3,500.00 per month as the landowners' share.

—5—

Defendant admits the allegation contained in paragraph four of the Complaint and states in addition thereto that said litigation began in July, 1952 with the Contest of the Will and ended in 1957 when Mr. A. J. Simler, plaintiff, was paid over $65,635.09 in oil runs by W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased; which was recovered as a direct result of the legal services and judgments obtained in favor of M[r]. A. J. Simler, the plaintiff and against the representatives of his sister's estate.

—6—

As to paragraph five, defendant admits that he employed two other attorneys to assist him in said cause and that one of them was Mr. James E. Grigsby on a 16⅔% contingent fee contract, payable out of the fifty per cent contingent fee contract signed by Mr. A. J. Simler, plaintiff, herein, which was done with knowledge and the consent of the plaintiff and later that contract was increased by defendant, Leslie L. Conner, from 16⅔% to 28⅓% and after working two years in the litigation the said Mr. James E. Grigsby quit and did not complete his agreement with this defendant, but thereafter and in May, 1957, out of the "oil runs" the said plaintiff was reimbursed for this payment to James E. Grigsby. Defendant employed Phil E. Daugherty to assist him in the case on a contingent fee agreement payable out of defendant's, Leslie L. Conner, *fifty per cent contract* and he has worked continuously in the case with this defendant.

—7—

As to paragraph six, defendant admits that Mr. Arnold B. Britton was an employee in his office working for defendant on a salary and that the legal services he performed in the "Simler Cases," he performed as an employee of this defendant and he was paid for all his work therein prior to March, 1956, when he voluntarily left the employment of this defendant.

—8—

As to paragraph seven, defendant admits that James E. Grigsby filed suits in the District Court against Mr. A. J. Simler and this defendant, Leslie L. Conner, in an attempt to get his fee before the litigation was completed and that plaintiff, Mr. A. J. Simler, did settle with Mr. James E. Grigsby, *which settlement was made without the knowledge, consent or approval of this defendant.*

—9—

As to paragraph eight, defendant admits that plaintiff, Mr. A. J. Simler, after receiving over $65,639.09 as a direct result of over 5 years' legal work of his attorney this defendant, Leslie L. Conner, he paid to defendant, Leslie L. Conner, $24,000.00, all as per written agreements made between the parties, copies of which are attached hereto, out of which defendant paid amounts to other attorneys who assisted him and for additional cost that he had paid, which left a part of the above sum for a part of his services. Defendant denies all other allegations of the Complaint.

ANSWER TO AMENDMENT TO COMPLAINT

For answer to the Amendment to the Complaint defendant states:

—1—

Defendant admits that the parties entered into a contract of employment as therein alleged and thereafter defined and clarified the meaning of the word *"reasonable contingent fee,"* which was all agreeable and agreed to by Mr. A. J. Simler, this plaintiff and Leslie L. Conner, this defendant, that from July, 1952 to the time the case was won and the property and farm were recovered Leslie L. Conner, this defendant, was the lawyer for the plaintiff, Mr. A. J. Simler.

—2—

Defendant denies that A. J. Simler, the plaintiff, paid any sums to Mr. Fred Suits, Miss Mary Weiss, or Messrs. Dudley, Dudley and Dudley but alleges any sums so paid by Mr. W. H. Wilson, the duly appointed, qualified and acting Executor (who was appointed by Birdine Fletcher, sister of the plaintiff), of the Last Will and Testament of Birdine Fletcher, deceased, by County Court order in case No. 31726, as Estate expenses.

—3—

Leslie L. Conner, defendant, states that he has performed his contingent fee contract and he is demanding that Mr. A. J. Simler, the plaintiff, perform his agreement and transfer to this defendant one-half of all sums and things of value recovered for him in this five year litigation all as agreed in writing between plaintiff and defendant in 195_ when plaintiff had been given *"$1.00 and no more"* in the Will of Birdine Fletcher and he employed plaintiff to try to obtain back from the "legatee named therein" the amounts his sister had given them in her will. Defendant denies the other allegations in the Amendment to the Complaint.

WHEREFORE, Defendant Leslie L. Conner, having fully answered the Complaint and Amendment prays that

plaintiff Mr. A. J. Simler, take nothing by this action and that the Complaint be dismissed and he have the judgment and the relief prayed for in his Counterclaim.

COUNTERCLAIM OF DEFENDANT LESLIE L. CONNER

Leslie L. Conner, defendant, for cause of action in this Counterclaim against plaintiff, Mr. A. J. Simler, alleges and states:

—1—

Jurisdiction is founded on diversity of citizenship and amount. Plaintiff Mr. A. J. Simler is a citizen and resident of the State of Arkansas and defendant and Counterclaimant, Leslie L. Conner, is a citizen and resident of the State of Oklahoma and the amount in controversy exceeds the sum of Ten Thousand dollars exclusive of interest and costs.

—2—

That plaintiff employed defendant and Counterclaimant as his lawyer to represent him *in a contingent fee attorneys contract* on July 18, 1952, and later on September 15, 1952, plaintiff and defendant clarified the terms of that contingent fee contract by an agreement in writing providing for a scale of contingent fees to be paid defendant on the settling of the case, or trials or appeals thereof: That defendant and counterclaimant has performed his contract and plaintiff herein refuses to perform his agreement for division of the property recovered for him by this defendant and counterclaimant growing out of the litigation involving the following facts in the following cases and appeals, as shown by the allegation and the attached exhibits

—3—

That John W. Fletcher was the owner and in possession of the 160-acre farm and property described as NW¼ of Section 34 in Township 6 North, Range 10 West of the I. M. in Caddo County, Oklahoma. He had married Birdine Simler, who was a sister of the plaintiff, A. J. Simler, and both now lived in Oklahoma City, Oklahoma. Plaintiff lived in Arkansas and was the only heir at law of his sister, Birdine Fletcher. That the farm was producing oil and had been for many years, being located in the rich Cement Field of Caddo County, Oklahoma. That plaintiff, Mr. A. J. Simler, in an effort to obtain control of the 160-acre oil producing farm did on October 2, 1950, file a petition in the County Court of Oklahoma County, seeking to be appointed Guardian of Mrs. Birdine Fletcher, his sister, and John W. Fletcher, his brother-in-law. (copies of his verified petition in Case No. 29063 County Court of Oklahoma are attached as EXHIBITS 1 and 2 as part of this Counterclaim). Upon hearing the Court appointed another Guardian and later Mr. John W. Fletcher died and Mrs. Fletcher, sister of plaintiff, was restored to legal capacity and her Guardianship ended and she was appointed Administratrix of his Estate, and as they had no children, she inherited and took possession of the Caddo County farm.

—4—

Birdine Fletcher, sister of plaintiff, then had prepared and she signed her Last Will and Testament, dated July 9, 1952, in which she made at least 19 bequests of money to others and in which she willed to the plaintiff Mr. A. J. Simler, her only remaining brother and sole and only heir at law the following:

> "I will and bequeath to my brother, A. J. Simler of Little Rock, Arkansas, the sum of one ($1.00) this amount and no more."

all as shown by a copy of her will hereto attached and made a part hereof as EXHIBIT 3. Birdine Fletcher died on July 13, 1952, and on July 18, 1952, Mr. A. J. Simler employed Leslie L. Conner, as his lawyer to represent on a contingent fee contract to contest the Fletcher will and to prevent probate thereof. A copy of that agreement of July 18, 1952, is attached as EXHIBIT 4 and made a part hereof.

—5—

Thereafter on July 30, 1952, plaintiff directed the filing of the first contest and began a part of the litigation. Copy of that direction is attached as EXHIBIT 5.

—6—

Thereafter a new theory of law and procedure was discovered by defendant and counterclaimant, Leslie L. Conner and the proposed Federal Court litigation was discussed and by mutual agreement and for the mutual benefit of both parties, the plaintiff, Mr. A. J. Simler, and defendant and counterclaimant, Leslie L. Conner, herein agreed in writing on September 25, 1952, on a clarification of the meaning of the term "reasonable fee" as used in the agreement of July 18, 1952, said agreement of September 25, 1952 being as follows:

"Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

Dear Sir:

With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered and if settled without trial.

33% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,
/s/ A. J. Simler

Copy of which is attached hereto as EXHIBIT 6 and made a part hereof.

—7—

The objections to the Probate of the Will of Birdine Fletcher, were prepared and filed in the County Court of Oklahoma County by defendant and counterclaimant in Case No. 31726 contesting the beneficiary Sisters of St. Francis, a corporation, who were to receive all of the Estate of Birdine Fletcher except a few thousand dollars bequests.

—8—

Thereafter on October 14, 1952, after much preparation and research the Federal Court Litigation was authorized and directed by plaintiff and the defendant and counterclaimant as his attorney to file suit in the United States District Court for the Western District of Oklahoma in Case No. 5619 in order to attempt to obtain the real estate in Caddo County, Oklahoma, for plaintiff and for such other matters as the Court may determine, copy of plaintiff's written direction is attached as EXHIBIT 7. It was filed as Cause No. 5619; and styled A. J. Simler, plaintiff, v. Sisters of St. Francis, a corporation, and W. H.

Wilson, Executor of the Estate of Birdine Fletcher, deceased. The case was contested by those defendant and dismissed by the District Court. A copy of the Appearance Docket in case No. 5619 is attached hereto as EXHIBIT 8 and made a part hereof and a copy of the opinion of the Court dismissing the cause (110F (s) 761) is attached as EXHIBIT 9 and made a part hereof. Hereafter said matter was appealed as case No. 4656 to the Court of Appeals Tenth Circuit at Denver, Colorado, briefed and orally argued and that Court entered a judgment reversing the trial court, a copy of that Opinion is attached as EXHIBIT 10 and made a part hereof and is recorded in 210 Federal (2) page 99. Appearance Docket on 4656 Court of Appeals is Exhibit No. 10A.

While this litigation was in process the County Court of Oklahoma County had entered an order in case No. 31726 admitting the will of Birdine Fletcher, deceased, to Probate and held the will valid and appointed W. H. Wilson the person she named in her will as Executor thereof, and a copy of that order dated October 2, 1952, is attached hereto as EXHIBIT 11, and made a part hereof.

—9—

Thereafter Appeal was had in the will Case No. 31726 from the County Court to the District Court of Oklahoma County and the cause became No. 129158 and, after much preparation and the testimony of over 50 witnesses used taking many days trial, Judge Clarence Mills of the District Court, affirmed the County Court order admitting the Will to Probate copy of the Appearance Docket in that District Court appeal case is attached as EXHIBIT 12, and made a part hereof.

—10—

That after the appeal of Mr. A. J. Simler, to the District Court in the will litigation and after the filing of Case 5619 in the Federal Court the Executor, W. H. Wilson, and the Sisters and several of their lawyers filed

an original action in the Supreme Court of Oklahoma against A. J. Simler as Case No. 36341, wherein they petitioned the Supreme Court to assume original jurisdiction of such a great and new question and to construe the statutes of the State of Oklahoma to assure them that the residuary beneficiary of the Fletcher will could take the real estate. This proceeding was vigorously contested, briefed and orally argued and won the Court denied the Executor and the Sisters' Petition and refused to take jurisdiction on February 2, 1954 copy of that Appearance Docket of the Supreme Court of Oklahoma is attached as EXHIBIT 13, and made a part hereof.

—11—

Thereafter Case No. 129158 in the District Court, which was 31726 in the County Court, on the Will Contest was appealed for A. J. Simler, plaintiff herein by his attorney, counterclaimant, Leslie L. Conner, to the Supreme Court of the State of Oklahoma, and became cause No. 36075 in the Supreme Court. After diligent research and briefing and vigorous oral argument made therein the case was affirmed by the Supreme Court of Oklahoma, which held the Will of Birdine Fletcher, sister of Mr. A. J. Simler, to be valid to pass title to all her property and denied the theories of the plaintiff that his sister, Birdine Fletcher, did not have testamentary capacity to make her will or and that she was under undue influence of the Sisters of St. Francis, a foreign corporation the principal beneficiaries under her will, who had been operating St. Anthony's Hospital in Oklahoma City.

Copy of that opinion in No. 36075 in the Supreme Court of Oklahoma is attached as EXHIBIT 14 and made a part hereof. Copy of the Appearance Docket in the Supreme Court is attached as 14A.

—12—

That while the litigation and contest were proceeding, both in the State and Federal Courts, W. H. Wilson, the Executor of the estate of Birdine Fletcher, deceased, and the Sisters of St. Francis, a foreign corporation, filed a petition for Certiorari ("Appeal") to the Supreme Court of the United States in Washington, D.C. from the judgment of the Court of Appeals, Tenth Circuit from 210 F (2) 99 and it was necessary for defendant and counterclaimant, Leslie L. Conner, to resist the Petition, which was successfully done and the Supreme Court of the United States denied Certiorari (the appeal) in Case No. 677, October, 1953, term on (April 25, 1954) as shown by EXHIBIT 15, attached hereto and made a part hereof, being reported in 347 U. S. 954 and 98 L. Ed. in 1099 and thereafter the Executor and the Sisters of St. Francis filed a petition for Rehearing and Motion to Stay of Proceedings in the Supreme Court of the United States in the same case, which was also denied by the Supreme Court on May 24, 1954, 98 L. Ed. 113, copy of which is attached as EXHIBIT 16 and made a part hereof.

—13—

Thereafter that appeal case was returned from the Supreme Court to the Court of Appeals, Tenth Circuit and then to the Western District of Oklahoma, in Oklahoma City, and it was necessary to make application and obtain from the Federal District Court certain injunctions against W. H. Wilson, the Executor, and the Sisters, and have judgment entered in Case 5619, which was done on June 14, 1954, copy of the judgment is attached as EXHIBIT 17, which was again appealed by Wilson and the Sisters to the Court of Appeals, Tenth Circuit, as Case No. 4961 and on Motion of Counterclaimant and for legal reasons the Court of Appeals dismissed their appeal

—14—

Thereafter in Case No. 5619 and on March 17, 1955, Injunctions were issued against Wilson and Sisters, copy attached as EXHIBIT 18.

—15—

Thereafter the said W. H. Wilson, Executor of the estate of Birdine Fletcher, deceased, and the Sisters of St. Francis, a corporation, and their attorneys continued to claim the farm and right to possession of the oil runs and because of their claims and acts it was necessary to file Case No. 6352 in the Federal Court styled by Mr. A. J. Simler, plaintiff, against the Sisters of St. Francis, a corporation, seeking to quiet title in Mr. A. J. Simler to the 160-acre oil farm, all as shown by the Appearance Docket being EXHIBIT 19 in the United States District Court for the Western District of Oklahoma.

—16—

Thereafter Mr. A. J. Simler filed a complaint in the United States District Court against Phillips Petroleum a corporation, for an accounting of the oil from the farm and to obtain the oil runs, copy of the Appearance Docket in Case No. 6363 in that Court is attached as EXHIBIT 20.

—17—

Thereafter Mr. A. J. Simler, as plaintiff, sued Phillips Petroleum Company to obtain later oil runs which they refused to pay him, as shown by Appearance Docket in Case No. 6795 being EXHIBIT 21.

—18—

Appeals were had on case 6452 and 6363 and from other orders in 5619 to the Court of Appeals, Tenth Circuit and attached hereto are the copies of the Appearance Dockets of the Court of Appeals, Tenth Circuit, the cases No. 5129 as EXHIBIT 22, Case No. 5130 as EXHIBIT 23, Case No.

5131 as EXHIBIT 24, attached as EXHIBIT 25 is the Injunction issued by the Court of Appeals, Tenth Circuit, March 15, 1955 on Application of A. J. Simler, in Case No. 5102 in that Court against the Executor and Sisters.

—19—

After the entry of the additional judgments of the Circuit Court of Appeals, W. H. Wilson, Executor of the estate of Mrs. Birdine Fletcher, and the Sisters of St. Francis, a corporation, who were defendant in these cases, filed another Appeal to the Court of Appeals, Tenth Circuit, and then to the Supreme Court of the United States asking Certiorari on a second Appeal from a judgment entered in 5619 which was denied on January 31, 1955, in Case 510 October Term 1954 Court as shown in 99 L. Ed. 728, copy of which is hereto attached EXHBIT 26.

—20—

After the Court of Appeals, Tenth Circuit had entered judgments in the cases 5129, 5130, and 5131 without opinions directing the Executor and the Sisters of St. Francis, a corporation, among other things, to divide the accumulated money and runs, W. H. Wilson, Executor, and the Sisters of St. Francis, a corporation, again for the third time sought Certiorari on appeal to the Supreme Court of the United States and the Executor and Sisters employed the John W. Davis, law firm, being Davis, Poll., Wardwell, Sunderland, and Kiendl, of New York City, a famous and outstanding New York law firm, to represent them. This action was resisted by defendant and Counterclaimant, Leslie H. Conner; but Certiorari was granted in Case 409 on November 14, 1955, and the judgments entered by the Court of Appeals, Tenth Circuit, in Cases 5129, 5130 and 5131 were vacated and the matter returned to the Court of Appeals, Tenth Circuit, as shown by the opinion in 100 L. Ed. 785 also—U. S. , copy of which is attached hereto as EXHIBIT 27. Petition for rehearing

was filed by defendant and counterclaimant, Leslie L. Conner, but was denied in January, 1956. See EXHIBIT 28.

—21—

Thereafter the County Court of Oklahoma County entered its Final Order in Case 31726, allowing the Final Account of the Executor on December 9, 1954, and distributing to A. J. Simler the 160-acre oil farm, but charging him with payment of all legacies, interest, taxes, costs and the expenses (which in effect vacated the order), a copy of which is attached as EXHIBIT 29, which order was appealed for Mr. A. J. Simler by his attorney, Leslie L. Conner, the defendant and counterclaimant, to the District Court of Oklahoma County on December 15, 1954, and who presented to and heard by District Judge A. P. VanMeter, who affirmed the order of the County Court, copy of the Appearance Docket in Case No. 134859 District Court of Oklahoma attached as EXHIBIT 30.

—22—

On Appeal to the Supreme Court of Oklahoma by defendant and counterclaimant, Leslie L. Conner, as Attorney for A. J. Simler, these causes became No. 37365 in the Supreme Court and after diligent work, planning, briefing, research and oral argument, the Supreme Court reversed that judgment in part, all as shown by a copy of the Appearance Docket in that case attached as EXHIBIT 31, which saved plaintiff, Mr. A. J. Simler, thousands of dollars, all being reported 308 P.2d 304, copy attached as EXHIBIT 32.

—23—

Thereafter Phillips Petroleum Company sued A. J. Simler and Wilson and Sisters for Interpleader on the oil runs it was holding as shown in copy of the Appearance Docket attached as EXHIBIT 33, being Federal District Court Case No. 7107.

—24—

Thereafter the estate of Birdine Fletcher was closed and W. H. Wilson, Executor of the Will and Estate of Birdine Fletcher, was discharged, all as shown by the Appearance Docket in Case No. 31726 attached here as EXHIBIT 34, and the property distributed and the plaintiff A. J. Simler obtained the farm and returns and the balance of the cash.

—25—

Thereafter the plaintiff and counterclaimant, this defendant, entered into written agreements dated May 22, 1957, which are self-explanatory, and copies are attached as EXHIBIT 35 on Division of money, and EXHIBIT 36, being agreement that plaintiff would not sell, dispose of, transfer or encumber the farm described as:

NW¼ of Section 34, Township 6 North, Range 10 West in Caddo County, Oklahoma,

before settling with defendant for his services.

That all 36 Exhibits attached hereto are made a part of the Answer and Counterclaim as though herein repeated and set forth in full.

—26—

The agreements for division of recovered property between plaintiff, Mr. A. J. Simler, and defendant and counterclaimant, Leslie L. Conner, was on a 50% basis because of the extensive litigation and Appeals and has not been performed by plaintiff, Mr. A. J. Simler, although defendant has worked as attorney for plaintiff for over 5 years, and *has performed his contract*, obtained the farm and balance of the runs and plaintiff, Mr. A. J. Simler, has refused to perform his agreement, now that recovery has been made and refuses to deliver to defendant, Leslie L. Conner, his attorney, his one-half of the recovery.

—27—

Plaintiff, Mr. A. J. Simler, did not own or have any right, title or interest in and to the 160-acre farm heretofore described and his only hope of securing any interest therein was by the diligent, constant and effective efforts of an attorney able and willing to prosecute his claim to a successful conclusion. The entire litigation involved in the contest of the will of Birdine Fletcher and the Federal Court Litigation to prevent the beneficiary from taking the property was both novel and extremely difficult. The plaintiff and contestant, Mr. A. J. Simler, was not a local citizen of this community (nor an established company) nor a regular client but was a resident of North Little Rock, Arkansas.

—28—

Employment and attempt to recover more than the "$1.00 and no more" which his sister willed him, in such case, was beset with legal disadvantages, considering the fact that the principal defendant and the beneficiary, the Sisters of St. Francis, in his sister's will was a Catholic Religious Society and Sisters operating the largest hospital and other charities in Oklahoma and who had befriended and taken care of Birdine Fletcher, his sister, in her old age and sickness. The fact that his sister, Birdine Fletcher, preferred and willed all her property to charity rather than giving it to her brother, this plaintiff, A. J. Simler. He had filed a Guardianship case against her in 1950 in an attempt during her lifetime to obtain possession of her property, in this action he failed.

—29—

Acceptance of employment in such a case involved many considerations. The employment was on a contingent fee contract, uncertain of compensation or return of expenses advanced or rent and salaries paid to employees and others and the investigation required and the amount

of work involved and *the daily cost of operating a law firm and office.*

—30—

The litigation took an excessive amount of *lawyer time, stenographers, briefs, conferences, letter writing, travel, research, arguments, telephone calls,* and expense involved a great amount of thinking, planning, investigation and constant work and effort all the time, on the part of the defendant and counterclaimant, Leslie L. Conner. It involved research writing and preparation of briefs and making of many legal arguments in the County Court, District Courts, and the Supreme Court and the Court of Appeals, Tenth Circuit; and the Supreme Court of the United States.

—31—

It also involved hours, days, weeks, and months and more than five years of work and labor. It took faith and perserverance (in order to win the case and obtain for A. J. Simler, this plaintiff, more than the "*$1.00 and no more*" which his own sister, Birdine Fletcher, had left him in her will).

—32—

Defendant and counterclaimant alleges he has fully performed his legal services and is entitled to his part of the recovery.

—33—

It was a contingent fee on a graduated scale made in 1952, when plaintiff had "*one dollar and no more,*" which fifty per cent or one-half contingent fee of whatever is recovered, after payment of expenses considering the amount involved, the number of cases and courts involved, is the customary charge made by members of the Bar in this locality who practice law and try law suits and appeal cases in the State and Federal Courts and

is the amount of contingent attorneys fees allowed by the laws of the State of Oklahoma. (It took skill and faith to conduct the litigation. The amount involved in this case was great. As a result of the skill, labor and legal services and the constant effort of this defendant and counterclaimant as the lawyer for the plaintiff, Mr. A. J. Simler, there was recovered the 160-acre oil producing farm with many oil wells and a share of the oil produced therefrom each month. Other wells are being drilled thereon and only the top soil sands have been produced and many feet of productive sands remain. It is very valuable and defendant and counterclaimant is entitled to be adjudged to be over one-half thereof.)

WHEREFORE, Leslie L. Conner, defendant and counterclaimant, prays this Court to enter judgment for him and against plaintiff as follows:

1. That this Court render a judgment in favor of Leslie L. Conner, defendant and counterclaimant herein and against the plaintiff, A. J. Simler, adjudging that defendant and counterclaimant, Leslie L. Conner, having performed all these legal services on a contingent fee contract and agreement as attorney for A. J. Simler, is entitled to, and adjudged to be, the owner of a one-half (1/2) undivided interest in all oil produced from the

> Northwest Quarter (NW¼) of Section Thirty Four (34) in Township Six (6) North, Range Ten (10) West in Caddo County, Oklahoma,

since April 1, 1957, and that after deducting of all sums paid to Mr. James E. Grigsby and Mr. John B. Ogden to May, 1957 and all court costs and expenses spent by defendant and counterclaimant, Leslie L. Conner, and all expenses spent by plaintiff A. J. Simler, that the defendant and counterclaimant be adjudged to be owner of one-half of the net remainder of the sum of over $30,000.00 paid to plaintiff, A. J. Simler, by the Executor in and since

May, 1957, less the amount paid at that time to defendant and counterclaimant by the plaintiff and,

2. That the Court enter judgment in favor of Leslie L. Conner, defendant and counterclaimant, and against A. J. Simler, the plaintiff, adjudging that Leslie L. Conner, defendant, and counterclaimant has an attorney's lien on and entitled to judgment for and the owner of an undivided one-half (½) interest in:

> The Northwest Quarter (NW¼) of Section Thirty Four (34), Township Six (6) North, Range Ten (10) West in Caddo County, Oklahoma,

and said lien be foreclosed all as provided by law and plaintiff be directed to execute the proper and legal conveyance of said one-half undivided interest in said land, and,

3. For such other further and different relief, legal or equitable, general or special, to which he may show himself entitled, including interest and costs.

LESLIE L. CONNER

Certificate

A copy of this answer to Complaint and Amendment to complaint and Counterclaim and all Exhibits made a part thereof were delivered to Hon. John B. Ogden, attorney for plaintiff, Mr. A. J. Simler, this 23rd day of September, 1958.

LESLIE L. CONNER

APPENDIX V

REPLY TO COUNTERCLAIM OF DEFENDANT

John B. Ogden
1408-9 Liberty Bank Bldg.
Oklahoma City, Oklahoma
Attorney for Plaintiff

May 15th, 1959

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil.

REPLY TO COUNTERCLAIM OF DEFENDANT

Comes now the above named plaintiff and for his reply to the Counterclaim set forth in Paragraphs 1 through 33, inclusive, and 1 to 3 in the prayer of the Counterclaim, and says:

1.

This plaintiff specifically denies that he entered into an agreement on September 25, 1952 for the purpose of clarifying the terms of the contingent fee contract entered into on July 18, 1952 between the plaintiff and the defendant, Leslie L. Conner.

2.

This plaintiff shows to this Honorable Court that the true facts with reference to the letter dated September 25, 1952 and referred to in Paragraph 2 of the Counterclaim are as follows.

3.

This plaintiff shows that heretofore and on or about July 18, 1952, he was introduced to the defendant, Leslie

L. Conner, and the plaintiff had not prior thereto known the said Leslie L. Conner and that on said date the plaintiff and defendant discussed employment by the plaintiff of the said defendant to represent this plaintiff as his attorney in a certain will contest case then filed and pending or about to be filed in the County Court of Oklahoma County, Oklahoma, involving the will of plaintiff's deceased sister, Birdine Fletcher. That at the time of the death of Birdine Fletcher she owned real property in Oklahoma City, Oklahoma, personal property, bonds, notes, and securities and the real estate consisted of a farm located in Caddo County, Oklahoma and described in the Counterclaim of the defendant herein.

4.

This plaintiff now shows that after a conference with the said Leslie L. Conner, he signed a letter of employment prepared by the said defendant and dated July 18, 1952, which letter of employment or copy thereof is pled in the Counterclaim on file herein and in which and by the terms of which the said Leslie L. Conner was to receive for his services a reasonable fee and this plaintiff was to pay the cost of the litigation which might or would thereafter ensue, all as more fully appears from a copy of said letter pled herein, and which said letter of employment is in words and figures as follows, to-wit:

"July 18, 1952

Mr. Leslie L. Conner, Atty.
410-414 Hightower Bldg.
Oklahoma City, Oklahoma.

Dear Sir:—

Re: BIRDINE FLETCHER ESTATE
COUNTY COURT, OKLAHOMA
COUNTY, OKLAHOMA

This confirms our employment of yourself and law firm to represent us in the matter of the Estate of

Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

We also agree to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

If the matter is not won, compromised or settled, you are not to charge us a fee.

Yours truly,

/s/ A. J. Simler
A. J. Simler, for himself
and his children"

5.

This plaintiff now shows to this Honorable Court that after the execution of said letter by the plaintiff, the relationship of attorney and client then existed and that the said defendant then became the attorney for the plaintiff and began representing the said plaintiff as his attorney in connection with the said estate or will contest.

6.

This plaintiff shows that thereafter, the said Leslie L. Conner, defendant in this cause, prepared a will for the said plaintiff by the terms of which the said Leslie L. Conner was appointed attorney for the Estate of A. J. Simler, plaintiff, and the said plaintiff at that time had great confidence in the said attorney, Leslie L. Conner, and on or about the 25th day of September, or shortly prior thereto the defendant Leslie L. Conner called the plaintiff by telephone and asked him to come to the office of the said Leslie L. Conner and advised him that he should come down in connection with re-writing the will of the said A. J. Simler and did not mention any change or modification or clarification of the contract of employment of July 18, 1952. The said plaintiff went alone to the office of Leslie L. Conner, and believing at the time that he was going there for the purpose of some matter in connection with the changing of his will and at the suggestion of said Leslie L. Conner.

7.

This plaintiff shows to this Honorable Court that at that time the offices where Leslie L. Conner officed had on the door and on their stationery "Conner, Hilpirt and Britton," and he assumed by virtue thereof that it was a law firm and also by virtue of the fact that the letter of July 18, 1952 prepared by Leslie L. Conner uses this language in part: "This confirms our employment of yourself and law firm. . . ."

8.

This plaintiff shows that when he arrived at the office of Leslie L. Conner, after a visitation, the defendant suggested that he take the plaintiff to lunch and plaintiff and defendant went to a cafe where beer was served and the defendant herein suggested to the plaintiff that he drink some beer and have lunch, which the plaintiff did. Then,

after lunch, the plaintiff and defendant, at defendant's suggestion, returned to the law office of the defendant and in the private office of the defendant, Arnold B. Britton, an associate or employee of Leslie L. Conner and Leslie L. Conner then proceeded to insist upon the plaintiff herein signing the letter dated September 25, 1952 and at that time this plaintiff had no advice other than the advice and admonition given him by his attorneys, Leslie L. Conner and Arnold B. Britton. That, at that time, the said Leslie L. Conner and Arnold B. Britton told the plaintiff that if he would sign the said letter, they would win for him everything in the estate and annul the will of Birdine Fletcher, and the said plaintiff herein argued with said attorneys and told them that he was willing for them to have a reasonable fee as provided in his letter of July 18, 1952, but that the said attorneys, namely, Leslie L. Conner and Arnold B. Britton, continued to harrass, harangue and argue with this plaintiff and coerced him and told him that it was to his best interest to sign said second letter on the 25th day of September, 1952.

9.

This plaintiff shows to this Honorable Court that at that time, he was past 74 years of age, had not had experience in litigation, had no way of knowing what was reasonable percentage-wise or otherwise in connection with the employment of attorneys and knowing that he had already employed said attorney for a reasonable fee, he continued to resist the demands, arguments, requests and advice of his lawyers to sign said contract or letter of September 25, 1952. This plaintiff further shows that he was worried over said litigation and greatly disturbed and had no one present with whom he could counsel and was not given an opportunity to seek outside or independent advice or counsel. Plaintiff shows that at that time he had great confidence in the said Leslie L. Conner and that the said

Leslie L. Conner knew that this plaintiff was without advice or knowledge concerning the matter and continually and consistently insisted upon the said A. J. Simler signing said letter. This plaintiff further shows that at such time and on said date this plaintiff executed a will prepared by the said Leslie L. Conner in which will the said Leslie L. Conner inserted the following paragraph in Article 9 thereof:

"I direct that the executor employ my attorney Mr. Leslie L. Conner, 410-415 Hightower Building, Oklahoma City, Oklahoma, as the sole and only attorney for my estate."

10.

This plaintiff further shows to this Honorable Court that he had advised Mr. Conner, the defendant, that he did not wish to have anyone present with him when he executed his will and that the said Leslie L. Conner knew on said occasion that none of the relatives or friends of the said plaintiff were with him or would be with him and it was agreed that he should come to the office alone on said date, namely, September 25, 1952. This plaintiff further shows that the witnesses to the said execution of said will were as follows: "Ruth Mayhew, Oklahoma City, Oklahoma," who was secretary to Leslie L. Conner, and "Arnold B. Britton, Oklahoma City, Oklahoma," who was either an associate, partner or employee of the said Leslie L. Conner, and "Leslie L. Conner, Oklahoma City, Oklahoma."

11.

That at said time the said Leslie L. Conner had already prepared before the plaintiff appeared in said office, the letter of September 25, 1952, and that said letter was not the idea, expression or will of this plaintiff, but constituted a prepared instrument by the said Leslie L. Conner before he had even talked to this plaintiff and that the day

of the month was blank on said letter and the word "*September,*" then "_____", "*1952*" was at the end or beginning of said letter. That the said defendant inserted with a pen the figures "25" in said date of the letter. This plaintiff shows to this Honorable Court that said letter did not express a free and mutual consent or a free consent upon the part of the said plaintiff, A. J. Simler. That this plaintiff had no way of knowing, to begin with, what was a reasonable fee, and the letter of July 18, 1952 constituted the contract of employment and there was no consideration whatsoever between the parties for the execution of the letter of September 25, 1952.

12.

This plaintiff further shows that Leslie L. Conner did not sign the said second letter or first letter and did not agree to do anything in the second letter that he was not bound to do by virtue of the first letter. And, there was absolutely no consideration of any kind, character, nature or description for the execution of the letter of September 25, 1952.

13.

This plaintiff shows to this Honorable Court that the said Leslie L. Conner is a lawyer of many years practice, is a graduate of the University of Oklahoma, licensed by the Supreme Court of Oklahoma, United State Court of Appeals, Tenth Circuit, United States District Court for the Western District of Oklahoma, and the Supreme Court of the United States, and that this plaintiff only has an Eighth Grade education, was old, worried and disturbed and without advice on said occasion except the advice of the said Leslie L. Conner, and Arnold B. Britton, and that said defendant, Leslie L. Conner, took advantage of his client in securing said letter and over-persuaded the said plaintiff to sign the said letter in the private, closed office of the said Leslie L. Conner, and the same did not constitute the will

or desire of the said plaintiff, A. J. Simler, but was only the will and desire or expressed only the will and desire of the lawyer who prepared said letter, namely, Leslie L. Conner.

14.

This plaintiff further shows that by virtue thereof said letter is void and void for the further reason that said letter was made and prepared for the benefit of the lawyer and to his advantage and is therefore void and of no force and effect because of the fact that the relationship of attorney and client then existed and the plaintiff had great confidence and respect for the said Leslie L. Conner and his opinion and advice and accepted the same solely in the signing of this letter over his actual protest.

15.

This plaintiff further shows to this Honorable Court that the said Leslie L. Conner is estopped to rely upon said letter or plead the same or receive any benefits by virtue thereof, and that the said Leslie L. Conner, in procuring the signature of the said A. J. Simler on said letter, acted fraudulently and in bad faith and was guilty of actual fraud under the circumstances hereinabove shown, and by virtue of such fraud, said letter is void and of no force and effect.

16.

That in addition to the above, this plaintiff shows to this Honorable Court that the circumstances as hereinabove pled under which said letter was signed also show that the defendant was guilty of constructive fraud in the preparation of said letter and securing the signature of the said A. J. Simler thereon and thereto without any advice whatever to the said plaintiff except the advice of Leslie L. Conner and Arnold B. Britton, and by virtue of all the

above, the said letter is absolutely void and of no force and effect and the defendant is not entitled to any benefits by virtue thereof or to claim any benefits or interest of any kind by virtue of said letter of September 25, 1952.

17.

This plaintiff shows to this Honorable Court that he always has been willing to pay to the defendant a reasonable attorney fee for his services and that plaintiff, up to this time, has paid to the said defendant Leslie L. Conner, the sum of $24,000.00, and that he believes the same to be reasonable under the circumstances, in view of the other sums and circumstances which will hereinafter be set out, but that this plaintiff is not versed in the law and does not know actually what is a reasonable fee and did not know on September 25, 1952 and therefore, he must of necessity, rely upon the same to be determined in this Court as to whether or not the $24,000.00 heretofore paid is reasonable compensation to the said Leslie L. Conner for his services rendered in said litigation.

18.

This plaintiff specifically denies the allegations in Paragraph 6 of the Cross Complaint and denies that the letter of September 25, 1952 was mutually agreed upon between the parties, but alleges the true facts to be concerning said letter as hereinabove set out and alleges and shows that said letter of September 25, 1952 is void and of no force and effect.

19.

This plaintiff further shows that the said will contest, mentioned in Paragraph 7 was lost and the will admitted to probate in the County Court of Oklahoma County, Oklahoma, and on appeal to the District Court, the protest was denied and the will was there admitted to probate and the cause was appealed to the Supreme Court of the State of

Oklahoma and again the will was admitted to probate and after the Petition for Rehearing in the cause, the opinion became final. That on or about the 16th day of October, 1952, there was filed in the United States District Court, under Case No. 5619 a case styled "A. J. Simler versus W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased and The Sister of St. Francis, a Corporation," asking for a Declaratory Judgment and asking the court, in effect, to declare that the Sisters of St. Francis, a Corporation, could not own or hold real property outside of an incorporated city or town and to forbid the corporation from attempting to hold the farm formerly owned by Birdine Fletcher in Caddo County, Oklahoma, for the reason that the farm was not reasonably necessary or proper for carrying on the business for which the corporation of "The Sisters of St. Francis" was chartered or licensed and, therefore, the property having been willed to the "Sisters of St. Francis" could not be received by such corporation, and that the plaintiff herein, being the brother of the deceased Birdine Fletcher, was entitled to inherit the said property, and that the defendant in that case filed a Motion to Dismiss Summary Judgment and the same was sustained and the cause was dismissed and appealed to the United States Court of Appeals of the Tenth Circuit, under Case Number 4656, styled "Simler versus Wilson et al.," cited at 210 F. 2d Page 99, and said cause was reversed and judgment was entered in favor of the plaintiff in that cause, who is the plaintiff in this cause, A. J. Simler.

20.

That in said cause in the United States Court of Appeals, James E. Grigsby appeared and argued said cause and Laglie L. Conner, Charles W. Conner, Arnold B. Britton and Phil E. Daugherty of Oklahoma City, Oklahoma, were with him on the brief for the appellant and said Court held, in effect, that the provisions of the Oklahoma Con-

stitution related to ownership of realty by corporations and provisions of business corporations act of Oklahoma relating to the same subject must be construed together and as so construed they forbid a corporation to take, acquire, hold or own realty outside of cities and towns and additions thereto except where reasonably necessary and proper for carrying on business for which the corporation was chartered or licensed and such provisions are prohibitory and not merely regulative, citing Oklahoma Constitution, Article 22, Section 2, 18 Oklahoma Statutes 1951, Article 1.20.

21.

This plaintiff now shows to this Honorable Court that after said opinion was rendered by said Court, the appellees therein filed a Petition for a Writ of Certiorari in the Supreme Court of the United States, which was by that Court denied and said judgment became final.

22.

This plaintiff shows to this Honorable Court that it was not absolutely necessary to raise such question or file such suit in the United States District Court and that the same could have been litigated in the state court without the necessity of going into the United States District Court, and that at the time of the death of Birdine Fletcher by virtue of the laws of the State of Oklahoma and constitutional provisions hereinabove set forth, this plaintiff became immediately the owner of said real estate situated in Caddo County, Oklahoma and the Circuit Court of Appeals of the Tenth Circuit in said opinion mentioned used the following language, in part:

> "And the land not being legally and effectively devised, no title vested in the devisees. Instead, title immediately passed under the law of descent and vested in the appellant as the sole heir at law of the decedent."

23.

This plaintiff admits that a suit was filed in the Supreme Court, as alleged in Paragraph 10 of the Cross Complaint and as reflected by Exhibit 13, and as heretofore pled, the plaintiff admits that the Supreme Court of the United States denied certiorari as shown by Exhibit 16, and that Exhibit 17 mentioned in Paragraph 13 of the Cross Complaint, reflects the rulings of the Court in said cause. That suit was filed as alleged in Paragraphs 15, 16, 17, 18 and 19, and that the exhibits attached to the Cross Complaint reflecting said proceedings are true and correct copies of what they purport.

24.

That certiorari was denied as reflected by Exhibit 26, in the Supreme Court of the United States, and that Court merely used the word "denied" with no opinion or argument thereon.

25.

This plaintiff admits the allegations with reference to the Petition for Certiorari alleged in Paragraph 20, but does not know how famous the lawyers mentioned therein are, but alleges the true facts to be that whatever their fame may be or have been, that he was required to pay them for their services in presenting said case in the Supreme Court of the United States, together with Fred E. Suits and John B. or J. B. Dudley of Oklahoma City, Oklahoma, and that in all of said litigation mentioned, this plaintiff was required to pay the attorneys opposing him who represented the estate and the Sisters of St. Francis, and that the defendant in this cause did not appear and argue said matter orally in the Supreme Court of the United States, but merely filed a brief and response, and that the opinion mentioned in Paragraph 20 by the Supreme Court of the United States, was rendered without oral argument and

merely upon the briefs, and no person was required to make a trip to Washington, D.C., in connection therewith. The opinion of the Supreme Court of the United States is, in words and figures as follows, to-wit:

"The Petition for Writ of Certiorari is granted. The judgment of the Court of Appeals is vacated and the judgment of the District Court reinstated."

26.

This plaintiff shows that he was required to pay the attorneys who secured said opinion which included Porter R. Chandler and Davis, Polk, Wardwell, Sunderland and Kiendl, all of New York City, and Fred E. Suits and J. B. Dudley, both of Oklahoma City, Oklahoma for the petitioners.

27.

The plaintiff admits the proceedings mentioned in Paragraph 21 and that the case was appealed to the Supreme Court of the State of Oklahoma, and is cited in 308 P. 2d, Page 304, as shown by Exhibit 32 attached to the defendant's Cross Complaint.

28.

This plaintiff admits that proceedings were had as shown and pled in Paragraph 23 of the Cross Complaint, as reflected by Exhibit 33 and Paragraph 24 of Exhibit 34, with reference to Paragraph 25 of the Cross Complaint.

29.

This plaintiff shows to this Honorable Court that on or about May 22, 1957, the plaintiff and defendant entered into said agreement merely for the purpose of compromising or disbursing money with the strict agreement that the same would not be used and that said agreement would

in no wise be used either for or against either of the parties, and that said agreement provides, among other things:

"Now, therefore, without prejudice to the claims, contentions or agreement of either Leslie L. Conner or A. J. Simler with reference to said attorney's fees, it is agreed as follows:

"First. That this instrument and agreement shall in no wise be considered by any of the parties hereto as a construction of the agreement with reference to attorney's fees between Leslie L. Conner and A. J. Simler, and this agreement shall not be offered as evidence in any court by either of the parties hereto or any other person or the heirs, executors, assigns or administrators of any of the parties hereto. It is understood between the parties that this agreement simply is made so that the money now on hand can be used in part and as hereinafter set out by the parties hereto."

Said exhibit being attached to the defendant's Cross Complaint as Number 35 and was made with the strict understanding and upon the honor and integrity of the parties herein involved that the same would neither be used in any shape, form or fashion by either of the parties in any litigation.

30.

This plaintiff shows that the said Leslie L. Conner has breached said agreement by attaching the same thereto as Exhibit 35 and pleading the same in this cause and attempting to gain advantage over this plaintiff, and that said exhibit should be stricken and not exhibited by the Court and that said agreement further provided, in part, as follows, and on Page 2 thereof, all future oil payments from the aforesaid described land shall be paid to A. J. Simler.

31.

This plaintiff further shows that the said Leslie L. Conner breached that part of said agreement by causing all oil runs to be tied up or held by the Phillips Petroleum Company, and that said funds have been accumulating on account thereof and that this plaintiff has not been permitted to receive said runs which are justly, legally, and rightfully his, and that the said plaintiff herein, A. J. Simler, has suffered great loss thereby.

31.

This plaintiff shows that the statutes of the State of Oklahoma provide that neither party can use against the other any statement in an effort to compromise any matter and for such reason said exhibit is wholly incompetent and should not be considered by this Court in determining this matter.

32.

This plaintiff specifically denies that the defendant was on a 50% basis as alleged in Paragraph 26 of his Cross Complaint and specifically denies that the defendant is entitled to 50% or any other percentage of the property of this plaintiff and alleges and states that the only sum to which the defendant is entitled is a reasonable attorney's fee and that the defendant should not attempt to claim an unreasonable fee, but that the defendant is attempting to take advantage of this plaintiff and collect an unreasonable fee and take the property which belongs to this plaintiff and which became his property upon the death of his sister, Birdine Fletcher.

33.

This plaintiff, with reference to Paragraph 27 of the Cross Complaint, denies that he did not own or have any right, title and interest in and to the 160-acre farm de-

scribed, but that he became the sole owner thereof upon the death of his sister, and that the question presented to the Court of Appeals, Tenth Circuit, as reflected by 210 F. 2d, Page 99, *Simler* v. *Wilson*, was not a difficult question, but was a simple question of fact that the corporation under the Constitution and Laws of Oklahoma, could not take, acquire, hold or own realty outside of cities and towns and additions thereto except where reasonably necessary and proper for carrying on business for which the corporation was chartered or licensed, and that such provisions are prohibitory, not merely regulative, and that such simple questions simply were that since the Sisters of St. Francis was a corporation, operating a hospital in Oklahoma City, Oklahoma, it could not take or hold said farm and that the question was not novel and extremely difficult, but was actually a simple lawsuit.

34.

This plaintiff, with reference to Paragraph 20 of the Cross Complaint, denies that he was beset with legal disadvantages merely because the Sisters of St. Francis was a Catholic religious society and operated a hospital in Oklahoma City, Oklahoma.

35.

This plaintiff specifically denies that he filed a guardianship case against his sister in 1950 in an attempt, during her lifetime, to obtain possession of her property and that he failed in said action, but alleges the true facts to be that his sister, at such time, was in a poor state of health, mentally and physically, and that he filed a Petition for Appointment of a Guardian, asking the Court to appoint him or any other suitable person to be guardian and that he told the County Judge to appoint any person that he saw fit and that the judge, after a full and complete hearing, held that Birdine Fletcher was incompetent to handle her affairs

and appointed the Fidelity National Bank of Oklahoma City, as her Guardian without any objection or protest upon the part of A. J. Simler. That plaintiff was acting in the utmost good faith to help and aid his sister during her incompetency, which the County Court found to exist, when she was fully represented by counsel and after hearing many expert witnesses and medical doctors as to her condition, and that when she filed an application to be restored to competency, the said A. J. Simler appeared in Court and told the County Judge that if the Judge thought she was mentally competent to look after her affairs, that he had no objection whatever to her being restored, that he was only acting for her interests and not his own. That the said A. J. Simler testified in such last case that his sister had shown improvement and that the County Judge then restored her to competency. That said proceedings somewhat irritated his sister, Birdine Fletcher, and that he believes that she was later influenced and that, as a result, she did not leave to him her property when she and the officials of the Sisters of St. Francis, or employees, prepared the will for Birdine Fletcher, deceased.

36.

This plaintiff now shows that after said guardianship proceedings, Birdine Fletcher gave this plaintiff a check for $500.00 as a gift and that she then realized he had acted for her best interests, but later when she became ill and was in said hospital, he believes and therefore alleges that she was unduly influenced against him, but that the said Leslie L. Conner and his associate counsel lost the will case under such circumstances.

37.

This plaintiff, with reference to Paragraph 29, specifically denies that the defendant paid out additional rent or paid additional money to employes on account of handling

the litigation involved and mentioned in the Cross Complaint, but alleges the true facts to be that the said Leslie L. Conner carried on his regular law practice in the same manner as he would have carried it on and with the same compensation he would have received had he not handled the case of this plaintiff, and shows that in addition thereto, that the said Leslie L. Conner told this plaintiff that he would have to hire or did hire a special stenographer for a short time and asked this plaintiff to pay him therefor, which the said plaintiff did pay to the defendant herein.

38.

This plaintiff denies the allegations in Paragraph 30 of the Cross Complaint and shows to this Court in connection therewith that this plaintiff paid to Leslie L. Conner money for traveling expenses, hotel bills in Denver, Colorado and other places, and paid for a trip for Arnold Britton to go to El Paso, Texas, and that Leslie L. Conner charged this plaintiff with his own personal expenses in going to Denver and other places in connection with this matter and this plaintiff specifically denies that Leslie L. Conner ever went to Washington, D.C., to the Supreme Court of the United States on any matter connected with the litigation herein and that neither lawyer appeared before the Supreme Court of the United States, and that if Leslie L. Conner went to Washington, D.C., he went on some other matter, and no business connected with any litigation pertaining to the Birdine Fletcher Estate or this plaintiff.

39.

This plaintiff denies specifically that the defendant, Leslie L. Conner, or anyone associated with him, put in five years of work and labor in this cause, but alleges the true facts to be that his work was very spasmodic and did not require very much work or labor in connection with this case, and no expense unknown to this plaintiff, and

plaintiff shows that he has paid out as expenses in this case and paid to Leslie L. Conner for expenses large sums of money, the exact amount of which at this time is unknown to this plaintiff, but will be well known to the defendant, and the said defendant has a record thereof or should have, and that the said Leslie L. Conner carried on his law practice as usual during said litigation and looked after his practice in the usual, normal and ordinary way.

40.

This plaintiff shows to this Honorable Court that he has been continually harassed, harangued, embarrassed and annoyed by the said Leslie L. Conner and his associates in that James E. Grigsby, one of the associates of Mr. Conner, sued the said A. J. Simler, attached his real property, and that the case was removed to the United States District Court for the Western District of Oklahoma, and that said A. J. Simler was forced to employ other counsel to represent him in said suit and did employ John B. Ogden to represent him therein and to assist Leslie L. Conner in the conclusion of the estate case with reference to the payment of attorney fees, administrator's costs, etc., in the District Court of Oklahoma County, Oklahoma, and the Supreme Court of the State of Oklahoma, and paid the said John B. Ogden $7,500.00 for his services in connection therewith and in order to settle the lawsuit with James E. Grigsby and attempt to get his runs or production from his farm released, settled said case with the said James E. Grigsby for the sum of $12,800.00 and took an assignment from the said James E. Grigsby for 28% of the attorney's fee which would become due to Leslie L. Conner and that Leslie L. Conner had assigned to James E. Grigsby 28% of his fee, which this plaintiff now owns, and that the said 28% was assigned over to the said A. J. Simler by the said James E. Grigsby, and the said A. J. Simler paid the said James E. Grigsby $12,800.00 for the same.

41.

This plaintiff shows that thereafter, Arnold B. Britton, another associate or employee or partner of the said Leslie L. Conner, sued the said A. J. Simler, attached his farm, and the case was removed to the United States District Court of the Western District of Oklahoma, and that the said A. J. Simler was forced to defend said action and that he did defend the same and had counsel appear in both the Grigsby Case and the Britton Case and contest the same, attend various motions, pre-trial conferences, and that the said A. J. Simler was forced to make many trips from his home in Little Rock, Arkansas, at great expense, annoyance and inconvenience to defend said cases which the said associates, employees or partners of the said Leslie L. Conner filed against him, and that the said Conner could not control said parties and admitted that he could not control his own partners and associates and that by virtue thereof, this plaintiff has expended large sums of money and has been continually troubled and harrassed by virtue thereof, and by virtue of having the runs from his property impounded by the Phillips Petroleum Company, and the same is still impounded, this time, however, by virtue of the conduct of the said defendant, Leslie L. Conner.

42.

This plaintiff shows to this Honorable Court that at this time he is 81 years of age and that such annoyance, harrassment and expense have caused him great anxiety and disturbance, and that the said Leslie L. Conner failed in his duties either in associating said parties in said litigation and in failing to control said parties and the said Leslie L. Conner wrote a letter to this plaintiff on October 4, 1955, which is in words and figures, as follows:

[APPENDIX]

"October 4, 1955
Mr. A. J. Simler
R. R. #3
Box 334
North Little Rock, Arkansas

Dear Mr. Simler:

Enclosed find our copies, which we have made and enclose, of the following pleadings filed in the Phillips case.

A. Answer and Counterclaim of Phillips Petroleum Corporation in which they state that Wilson and the Sisters are still claiming interest.

B. Separate Answer of James E. Grigsby.

C. Motion for Production of Document.

D. Notice to take Deposition on Oral Examination.

I have been out of the city for the past few days and on my return, I found these papers: Notice to produce documents and contract, and Notice to take your deposition. According to the certificate he mailed your copy, which you probably have by now. Under the federal rules you are required to be present in person for the taking of the deposition on the date set out in the notice or, have it continued.

Since we are not informed as to your recent conversations with Mr. James E. Grigsby, relative to his employment, and in as much as he has filed an answer and counterclaim without our consent or approval, and which we do not believe is a proper part of this case, and since you think there is a question about the attorneys' fee due, it is our suggestion that you engage counsel to represent you in the question of Grigsby's Cross Petition about his fee matter, only, and we will

continue to represent you and do our best to bring this original litigation to a conclusion.

Due to the urgency of this matter, we are sending a copy to Mr. Kenneth Coulter, Court House, Little Rock, Arkansas; and we suggest that you advise us immediately as to your decision in this matter.

Yours truly,

CONNER, HILPIRT & BRITTON
By LESLIE L. CONNER

LLC:djh
Enc.

P.S. Under separate copy we are sending you a copy of the Answer Brief in the Sisters' and Wilson's Petition for Certiorari in the Supreme Court of the United States."

43.

This plaintiff further shows to this Honorable Court that after he signed the letter prepared by Leslie L. Conner under the circumstances hereinabove set out on the 25th day of September, 1952, that he advised the said defendant that he would not proceed under said letter, and that the same was unfair, unjust and was not binding upon him and that he would only pay Leslie L. Conner, a reasonable fee and that was the only condition under which he would proceed with said litigation and that the said Leslie L. Conner, in the presence of Arnold Britton, James E. Grigsby and Phil E. Daugherty, tried to get the said plaintiff herein to sign a deed for one-half of the farm of this plaintiff, or 80 acres, and this plaintiff told all of said parties in the private office of Leslie L. Conner that he would not pay 50% or give up half of his farm under any conditions whatsoever, and that said lawyers then attempted to get him to sign said deed, and he steadfastly refused and told all the

lawyers he was not bound by a 50% agreement, and that if they did not want to proceed on reasonable fee terms, he would quit and would not under any conditions pay 50% or one-half of his property, but would only pay a reasonable fee and that finally, after the said Simler and the parties had remained in the office for approximately an hour or more, Mr. Phil E. Daugherty stated "Simler definitely isn't going to sign this and there is no use to talk with him further about it."

44.

This plaintiff shows now that the said Phil E. Daugherty made the said statement quoted in Paragraph 43 above at least twice, and finally, after more than one hour of haranguing this plaintiff, said meeting was adjourned, and this plaintiff now shows that after the said Leslie L. Conner knew of said matter and proceeded to represent the plaintiff thereafter that he then became estopped to claim or assert anything other than the reasonable lawyer fee, and that was the basis upon which he was employed to begin with and the basis upon which he represented Mr. Simler during the litigation.

45.

This plaintiff shows that Kenneth Coulter mentioned in the letter quoted below, was the son-in-law of the said A. J. Simler, plaintiff in this cause, and was Court Reporter at Little Rock, Arkansas in the Chancellor Court, but that the said Kenneth Coulter is now deceased, but that during his lifetime, he advised Mr. Conner that Mr. Simler would not and should not pay anything other than a reasonable fee and that if the said defendant wanted anything more than a reasonable fee, that he should not proceed further as attorney for the plaintiff herein. Mr. Coulter's letter above mentioned is quoted below as follows, as written by the said defendant, Leslie L. Conner:

October 24, 1955

"Mr. Kenneth Coulter
Court House
Little Rock, Arkansas

Dear Mr. Coulter:

Your letter of October 21 is acknowledged and you are advised that Mr. James E. Grigsby has not been fired from our staff.

We agree that the constant threat of litigation is most annoying, and if you and Mr. Simler think that an advancement to Mr. Grigsby, without prejudice to anyone's rights would be advisable, we would cooperate.

We are sorry to learn of Mrs. Simler's illness and trust that she is improved. Please advise us.

Yours very truly,

(Signed)
LESLIE L. CONNER

LLC ab
cc A. J. Simler"

46

This plaintiff further shows that, finally, his patience was exhausted on account of all the litigation and lawsuit and harassment and that he discharged the defendant by written letter, and that after said time, the parties agreed that the said Conner could continue without any prejudice to his rights or the rights of this plaintiff in connection with the settlement of the lawyer fee, and that he was permitted to continue at the suggestion of John B. Ogden, attorney for the plaintiff herein, and it was distinctly agreed and understood that it should be without any prejudice to the rights of the defendant or of the plaintiff with reference to a lawyer fee in this cause.

47.

This plaintiff now shows, however, that at all times shortly after the letter of September 25, 1952 was written, the said Conner knew that the said plaintiff in this cause would not agree to anything other than a reasonable fee and refused to recognize the letter of September 25, 1952.

48.

This plaintiff further shows that he wrote a letter on the 16th day of December, 1955 to the said Leslie L. Conner, and sent the same by registered mail and that the said Conner received the same, which letter is in words and figures as follows, to-wit:

"Oklahoma City, Oklahoma
December 16, 1955

Mr. Leslie L. Conner
Attorney at Law
Hightower Building
Oklahoma City, Oklahoma

Dear Sir:

Affirming our telephone conversation of this A.M. in which you definitely refused to commit yourself as to the amount of attorney's fees you would accept as my counsel, and further, because of dissension among your force, I believe it impossible for you or your force to serve my best interest, and I am compelled, (much as I regret it), to dispense with your services, as of this date.

Yours truly,

(Signed): A. J. SIMLER"

49.

This plaintiffs shows to this Honorable Court that the said Grigsby and Conner became either quarrelsome with

each other or disagreed for some cause, and each one would call or write the plaintiff, criticizing the other, and would either come or send people to Little Rock in an effort to gain an advantage over the other.

50.

This plaintiff shows that the defendant suggested that the said plaintiff employ counsel to represent him and this plaintiff shows that he wrote Leslie L. Conner on September 29, 1955, and advised him specifically as to previous statements and conduct of the said Leslie L. Conner, which letter is in words and figures as follows:

No. Little Rock, Arkansas
September 29, 1955

Mr. Leslie Conner,
414 Hightower Building,
Oklahoma City, Oklahoma

Dear Sir:

Yours of 9/19 to hand, and in reply will say as to your understanding of my statement of Dec. 10, 1954, when four or five of you attys. tried to high pressure me into signing a deed to 80 acres of the farm, and my refusal, you will recall that upon a question from Mr. Grigsby as what I intended to do, I replied that the only contract I recognized was the one containing the proposition that you yourself, Mr. Conner, made to represent us in this case. That one was for a reasonable fee & if we could not agree as to a reasonable fee we would let the Co. Court or any other court decide a reasonable fee. As to your hiring other lawyers, that was your own proposition. It is no fault of mine that you were not big enough to handle this case. As you must recall, I, thru Mr. Coulter, attempted to get you to discuss this proposition about August 30th, 1954 and

you flew into a rage, stating that when the case was finally settled was time enough to talk fees. So your statement that you did not know of my dissatisfaction as to your claim of fifty per cent was grossly in error.

Furthermore, I now direct, as I have told you before, not to file any more law suits against Phillips Petroleum Company or anybody else without specific instructions from me.

Again assuring you of my willingness to be more than fair in this matter, I am

Yours very truly,

(signed) A. J. SIMLER
Route 3, Box 334
No. Little Rock, Ark."

51.

On August 31, 1955, the plaintiff wrote the defendant a letter which was received by the defendant, and which is in words and figures as follows, to-wit:

"North Little Rock, Arkansas
August 31, 1955
Mr. Leslie L. Conner,
414 Hightower Building
Oklahoma City, Oklahoma

Dear Mr. Conner:

I am in receipt of your letter of August 25 inclosing checks which is figured upon a fifty per cent fee to you. You urged me to make such an agreement on December 10th last, and to sign a quitclaim deed to that effect, which proposition I refused. You are advised that my proposition remains as it has always been; I will not convey to you, as a part of your fee, any part of this realty. The contract of July 18, 1952 provides for a reasonable fee, and if we are unable to agree

upon what constitutes a reasonable fee, I am willing to leave it to the Court, as per said contract. The proposition was made by you, accepted by me, and your proposition now comes as a surprise. Please remember that, at considerable expense to us, we lost completely in the Oklahoma state courts.

I am considering submitting this matter to an unbiased and unprejudiced attorney. In that connection I would like to have the following:

1. Copy of motion of Phillips Petroleum Company to pay over the money in their hands;
2. Order upon such motion;
3. Photostatic copy of contract of July 18, 1952;
4. Photostatic copy of contract of September 25, 1952;
5. Photostatic copy of other contracts, if any, relating to fee

You will recall that I executed a will, which I believe was in the latter part of September, 1952, which I left in your safekeeping. Please send this to me.

Very truly yours,
(Signed) A. J. Simler"

52.

This plaintiff further shows to this Honorable Court that he received a letter from the defendant in regard to the case of *Britton* v. *Simler*, wherein Mr. Britton had sued Mr. Simler, claiming a large lawyer fee against him, and that Mr. Simler was forced to and did employ counsel to represent him in said cause, and the defendant, Leslie L. Conner, did not represent him therein but did make a suggestion in the matter and said letter referring to said

cause from the defendant Leslie L. Conner is in words and figures as follows, to-wit:

"November 9, 1956

Mr. Phil E. Daugherty
Lawyer,
First National Building
Oklahoma City, Oklahoma

Mr. John B. Ogden
Lawyer
Liberty Bank Bldg.,
Oklahoma City, Oklahoma

Gentlemen: Re: Britton v. Simler

We learned today that this case is set on the pre-trial docket before Judge W. R. Wallace on November 16, 1956.

We enclose the original letter from Britton to Simler which Mr. Ogden sent us after Mr. Simler mailed it to him.

When I talked to Britton about this and before the suit was filed he told me that Mr. Simler had agreed to pay him a fee and employed him when he went to Arkansas to see Mr. Simler last year.

However, in this letter he says Mr. Simler employed him in January 12, 1956 and in the *rth* paragraph of the letter he says Mr. Simler agreed that a substantial fee had been earned when he visited Mr. Simler in his home in Arkansas.

In the complaint he alleges that he was employed on July 18, 1952 and performed legal services to March, 1956 when he without notice left me and that in May, 1956 that Simler discharged him.

It seems that either deposition should be taken or interrogatories should be served to definitely get his claim. However, this is merely a suggestion to you.

Yours truly,

(Signed): LESLIE L. CONNER"

53.

This plaintiff further shows to this Honorable Court with reference to the litigation in the United States Circuit Court of Appeals, Tenth Circuit, reported in 210 F, 2d, beginning at Page 99, that in the trial court, namely the United States District Court of the Western District of Oklahoma at Oklahoma City, Oklahoma, there was no evidence offered. The matter was disposed of by motion and ruling of the court, and not one witness on either side was produced or testified. That it was not a trial that even required the listening to one witness on either side, but was merely a simple question of law plainly written in the Constitution and Statutes of the State of Oklahoma, and that the said Leslie L. Conner did not even appear in Denver in the United States Court of Appeals and argue said matter, but that James E. Grigsby argued said matter in the Court of Appeals in Denver, and that the plaintiff herein paid his expenses for going to Denver to argue said matter, and that on September 11, 1953, the said defendant, Leslie L. Conner, wrote plaintiff with reference thereto, which letter is in words and figures as follows:

September 11, 1953

Mr. A. J. Simler
Rural Route #3
Box 334
North Little Rock, Arkansas

Dear Mr. Simler:—

Enclosed find speech which James E. Grigsby made before the Circuit Court of Appeals at Denver on

Thursday, September 10, 1953. I received a call from Mr. Grigsby last night from Denver, and he said the speech and argument was very well received by the Court. We should have an opinion from the Court in this case within the next 60 days.

We will keep you advised.

Yours truly,

(Signed) 'Leslie L. Conner R'
CONNER, HILPIRT & BRITTON'

54.

This plaintiff most respectfully shows that Conner, Hilpirt and Britton used the name of "Conner, Hilpirt and Britton" on its letterheads and also had the names on the letterheads of Leslie L. Conner, Charles W. Conner, A. L. Hilpirt, and Arnold B. Britton, leading this plaintiff to believe that the firm was representing him, but the plaintiff has learned since that Mr. Hilpirt was deceased for the greater part of the time, and although the letters were signed, as indicated above, "Conner, Hilpirt & Britton," the said Hilpirt was deceased and the plaintiff has been informed and verily believes, having received his information from Leslie L. Conner, that Mr. Britton was not even a member of the firm, and that such conduct on the part of the defendant misled the plaintiff herein.

55.

This plaintiff now shows to this Honorable Court that many of the suits filed by the firm mentioned in paragraph 54 herein were unnecessary, and only created expense which this plaintiff was forced to pay, and which suits were eventually lost, and that this plaintiff paid all expenses in the Supreme Court of the State of Oklahoma on the will contest, which was lost, and that actually, the only case that was won was the case of *"Sinder v. Wilson,"* reported

in 219 F. 2d, Page 99, *supra*, and in the Supreme Court of Oklahoma, on the question of costs and attorneys fees, the Supreme Court held, in effect, that the plaintiff in this cause should not be required to pay the bequest under the terms of the will of the late Birdine Fletcher, his sister, which bequest had already been paid and that under the terms of the will, it was construed that she intended that the bequest be paid out of her personal property, money and bonds on hand, but the said plaintiff was required to pay all the attorney's fees, costs of administration and taxes, which amounted to more than $100,000.00.

WHEREFORE, having fully answered herein and replied to the Counterclaim, this plaintiff prays that the prayer of the Counterclaim and the Counterclaim of the defendant, Leslie L. Conner, be denied and this Court fix a reasonable attorney's fee for the defendant herein and determine what is a reasonable fee under the circumstances and under the evidence, and that plaintiff have his costs herein expended, for such other relief as may appear proper, whether legal or equitable, general or specific, to which the evidence may show him entitled.

JOHN B. OGDEN
1408-1411 Liberty Bank Building
Oklahoma City, Oklahoma
Attorney for Plaintiff

Certificate

This is to certify that a true and correct carbon copy of the within and foregoing Reply to Counterclaim of Defendant was mailed this the ____ day of May, 1959 to Messrs. Robert O. Bailey and Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma.

JOHN B. OGDEN

[APPENDIX]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF THE STATE OF OKLAHOMA

A. J. Simler, Plaintiff, v. Leslie L. Conner, Defendant. No. 8008 Civil

---

REQUEST FOR JURY TRIAL

Comes now the above named plaintiff, A. J. Simler, and shows to the Court that he has heretofore requested a jury trial in this cause and that he now again requests that this cause be submitted to a jury to determine the facts herein and hereby specifically requests a jury trial in this cause.

Dated this the 14th day of May, 1959.

A. J. SIMLER, Plaintiff
By JOHN B. OGDEN
1408-1411 Liberty Bank Bldg.
Oklahoma City, Oklahoma
Attorney for Plaintiff

This is to certify that a true copy of the above and foregoing Request for Jury Trial was mailed to Messrs. Robert O. Bailey and Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma.

JOHN B. OGDEN

Office-Supreme Court, U.S.
FILED
DEC 29 1961
JOHN F. DAVIS, CLERK

COURT, U. S.

IN THE

Supreme Court of the United States

1962

No. [redacted] 59

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No.

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Court has already decided the question which the Petitioner is presenting. Petitioner is attempting to ignore this Court's decision against it in *Conner* v. *Simler*, 367 U.S. 486, handed down on June 12, 1961. In its Mandate this Court directed the Court of Appeals for the Tenth Circuit to reconsider its holding that the present Petitioner was entitled to a jury trial "in the light of *Southard* v. *MacDonald*, 360 P. 2d 940." The Tenth Circuit acted strictly within the terms of this Mandate, applied *Southard* v. *MacDonald*, and ruled that this "action is purely equitable" in nature, and should be determined by the court without a jury."

This new petition is in reality a petition for rehearing. But no circumstance has intervened, as this Court's Rule 58 requires, since this Court's decision except the Tenth Circuit's reconsidgration in obedience to that decision. Nor has the present petitioner raised a substantial ground not previously presented. The same ground was urged at page 15 of the Respons to Petition for Rehearing filed in *Conner* v. *Simler*, *supra*.

Respondent respectfully requests this Court to deny the petition.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 59

(Original No. 639, October Term, 1961)

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER,
Respondent.

BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1962.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 9-8780

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BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion to be reviewed herein is styled: *A. J. Simler, Appellant* v. *Leslie L. Conner, Appellee*, 295 F.2d 534, wherein the Circuit Court denied the petitioner a jury trial. Prior to the rendition of this opinion by the United States Court of Appeals, Tenth Circuit, the Court of Appeals, Tenth Circuit, in the same case reversed and remanded the cause to the United States District Court for the Western District with instructions to grant a jury trial in conformity with the views expressed in the opinion. This case is found in 282 Fed.Rep. 2nd Series, beginning on page 382.

Prior to the last mentioned opinion, and on January 7, 1960, in an action styled A. J. Simler, Petitioner v. Honorable Stephen S. Chandler, U. S. District Judge for the Western District of Oklahoma, Respondent, on Petition for Writ of Mandamus, the United States Court of Appeals, Tenth Circuit, entered its Order and Judgment, paragraph 1 of said Order being as follows:

> "That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, v. Leslie L. Conner, defendant, Civil No. 8008, and submit to a jury for determination all disputed issues of fact arising in such action."

The complete Order is reflected on pages 108 and 109 of the Printed Record before this Court.

The judgment of the Court of Appeals involved herein was entered on October 12, 1961 (Record pp. 115-117, incl.), *rehearing denied* November 18, 1961, *Petition for Certiorari* filed December 29, 1961, *certiarari granted* January 15, 1962 (82 S.Ct. 440).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law."

Rule 38 of the Rules of Civil Procedure containing the pertinent parts thereof as follows:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issue. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action."

Oklahoma Constitution and Statutes as follows:

Art. 2, Sec. 19, of the Constitution of Oklahoma:

"Trial by jury

"The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve (12) persons; but in county courts and courts not of record, a jury shall consist of six (6) persons. This Section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than Twenty Dollars ($20.00). In civil cases, and in criminal cases less than felonies, three-fourths (3/4) of the whole number of jurors concurring shall have power to render a verdict. In ail other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein. As amended State Question No. 354, Referendum Petition No. 101. Adopted primary election July 1, 1952."

Art. 7, Sec. 20, of the Constitution of Oklahoma:

"Waiver of jury

"In all issues of fact joined in any court, all parties may waive the right to have the same determined by jury; in which case the finding of the judge, upon the facts, shall have the force and effect of a verdict by jury."

Art. 1, Sec. 1, of the Constitution of Oklahoma:

"The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Art. 2, Sec. 6, of the Constitution of Oklahoma:

"The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Title 12, O.S.A., Sec. 554:

"An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading."

Title 12, O.S.A., Sec. 555:

"Issues both of law and fact, may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct."

Title 12, O.S.A., Sec. 556:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in action for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

Title 15, O.S.A., Sec. 57:

"Kinds of fraud

"Fraud is either actual or constructive."

Title 15, O.S.A., Sec. 58:

"Actual fraud defined

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

"2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.

"3. The suppression of that which is true, by one having knowledge or belief of the fact.

"4. A promise made without any intention of performing it; or,

"5. Any other act fitted to deceive."

Title 15, O.S.A., Sec. 59, is as follows:

"Constructive fraud defined

"Constructive fraud consists:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

"2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

Title 15, O.S.A., Sec. 60:

"Actual fraud is always a question of fact."

Title 15, O.S.A., Sec. 61:

"Undue influence defined

"Undue influence consists:

"1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

"2. In taking an unfair advantage of another's weakness of mind; or,

"3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

QUESTIONS PRESENTED

The questions presented herein are as follows:

1. In a diversity case in the United States District Court does the Constitution Seventh Amendment and Federal Rules of Civil Procedure govern in determining whether or not a litigant is entitled to a jury trial, or does the state law govern such question?

2. If the Constitution of the United States governs and the Federal Rules of Civil Procedure, then is the petitioner in this case entitled to a jury trial under the pleadings involved herein?

3. If the law of Oklahoma governs in determining whether or not the petitioner is entitled to a jury trial, then is the petitioner entitled to a jury trial under the Oklahoma law under the facts as set forth in the pleadings herein?

STATEMENT

This is an action by the petitioner against the respondent for declaratory judgment asking the United States Court to determine whether or not the petitioner owes the respondent any additional sums as attorney's fees.

Factually, the respondent was the attorney for the petitioner in litigation which arose in 1952, and on the 18th day of July, 1952, Mr. Simler employed Mr. Conner as his attorney by way of a written letter which Mr. Conner prepared and had Mr. Simler to sign. The letter is in words and figures as follows, to-wit (R. p. 4):

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

"Dear Sir:—

"Re: Birdine Fletcher Estate
County Court Oklahoma County, Oklahoma.

"This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled you are not to charge us a fee.

"Yours truly,

"/s/ A. J. Simler

A. J. Simler, for himself and his children."

After this relationship of attorney and client existed, the attorney, Mr. Conner, under the guise of writing a will for Mr. Simler, asked Mr. Simler to come to his office on September 25, 1952, and secured the signature of Mr. Simler to a letter, which apparently had been prepared before Mr. Simler came to the office, since the word "September" and "1952" were on the dated portion of the said letter, and the day of the month was underscored and left blank and supplied with a pen, and was supplied after Mr. Simler arrived. That letter is in words and figures as follows, to-wit (R. p. 12):

"Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

"Dear Sir:

"With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is to be paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"/s/ A. J. Simler"

Mr. Conner secured the services of James E. Grigsby, an attorney, to file in the United States District Court for the Western District of Oklahoma a declaratory judgment action wherein it was sought to have the court declare that the Sisters of St. Francis, a foreign corporation, could not take land outside of a city or town unless it was necessary for such foreign corporation in the carrying out of its

business. Under the then provisions of the Oklahoma Constitution, a foreign corporation could not hold land outside of a city or town unless it was reasonably necessary for its uses in carrying out the purposes of the corporation. The United States District Court dismissed the action by sustaining a motion for summary judgment and no evidence was introduced and appeal was had to the United States Court of Appeals, Tenth Circuit, and such court reversed the United States District Court and ordered judgment entered in favor of A. J. Simler, who was the next of kin of Mrs. Birdine Fletcher, deceased; the property having been willed to the Sisters of St. Francis, and such foreign corporation was utterly forbidden to take the property by reason of the fact that it was a 160-acre farm outside of a city or town, and therefore, Mr. Simler, being the only next of kin inherited and took under the Laws of Descent and Distribution of the State of Oklahoma, the statutory and constitutional provisions prohibiting the foreign corporation from taking under Constitution of Oklahoma, Art. 22, Sec. 2, 18 O.S. 1951, Secs. 1-120, 541-589. The last mentioned case is reported in 210 F.2d beginning on page 99 and styled *Simler* v. *Wilson, et al.*, in which Writ of Certiorari was denied by this Court on April 26, 1954. See 74 S.Ct. 681.

There was other litigation, the Supreme Court of Oklahoma upholding the will of Birdine Fletcher after the County Court (court of original jurisdiction in the will contest), upheld the will, the State District Court on appeal from the County Court upheld the will and was affirmed by the Supreme Court of Oklahoma. Thus, all of

the property, except the farm, located in Caddo County, Oklahoma, went to the Sisters of St. Francis and others not related to the petitioner, and the only benefits he received was the benefit granted to him by the Circuit Court of Appeals in holding that the farm in Caddo County was inherited by the petitioner, A. J. Simler. There was other litigation with reference to paying the costs of administration, that is the executor's fees, estate taxes, attorney's fees for the executor, and Mr. Simler was required to pay out of the proceeds of the farm, which had producing oil wells thereon, all of the executor's fees, attorney's fees for the executor, all the estate taxes, all of which amounted to in excess of $100,000.00. In addition to the above, Mr. Simler paid to Mr. Conner $24,000.00 on attorney's fees, paid all the cost of litigation, including briefs, and even the expenses of his attorneys to Denver, Colorado, and other places, and when the litigation was finally concluded, the petitioner, Mr. Simler, paid Mr. James E. Grigsby, who had a contract with Mr. Conner to assist him for 28 per cent of Mr. Conner's attorney fee, and after Mr. Grigsby had sued Mr. Simler twice in the United States District Court and attached his farm claiming an attorney's fee against Mr. Simler, through Mr. Conner, Mr. Simler paid Mr. Grigsby $12,800.00 lawyer fee and took an assignment of Mr. Grigsby's interest in the attorney's fee. Then Mr. Arnold Britton, another associate of Mr. Conner's, sued Mr. Simler in the United States District Court and Mr. Simler was forced to and did employ John B. Ogden, the writer of this brief, as his counsel both in the Grigsby case and in the Britton case, to defend him and to assist Mr. Conner in other litigation.

Mr. Conner and Mr. Simler were unable to agree on what additional money Mr. Conner should be paid as his attorney fee, and it was necessary to file this case in the United States District Court for a declaratory judgment, which was filed April 24, 1958. The case originally came for trial before the late Honorable W. R. Wallace, United States District Judge who held that the plaintiff in that case, A. J. Simler, was entitled to a jury trial. Later, the case was transferred to the Honorable Stephen S. Chandler, United States District Judge who held that the petitioner here, plaintiff there, A. J. Simler, was not entitled to a jury trial. Then Mr. Simler filed in the United States Court of Appeals, Tenth Circuit, an action referred to heretofore, asking the United States Court of Appeals to order Judge Chandler to give a jury trial. The United States Court made such an Order on January 7, 1960; see Record pages 108, 109. After this Order was made on the 12th day of January, 1960, the Honorable Stephen S. Chandler sustained the Motion for Summary Judgment and rendered a summary judgment against Mr. Simler. From such summary judgment an appeal was perfected to the United States Court of Appeals, Tenth Circuit, and the United States Court of Appeals reversed; See *Simler v. Conner*, 282 F.2d 382, and held that the appellant there, petitioner here, was entitled to a jury trial. The respondent here, Leslie L. Conner, filed Petition for Certiorari in this Court; see *Conner v. Simler*, 367 U.S. 486. Certiorari was denied. On petition for rehearing this Court vacated the judgment of the Court of Appeals, Tenth Circuit, and directed the Court of Appeals to reconsider its opinion in the light of *Southard v. McDonald*, 360 P.2d 940. The Court of Appeals

did reconsider, and on reconsideration held in effect that this case should be tried without a jury. See 295 F.2d 534 and Record pp. 115-117, incl. It will be noted from reading the last opinion of the United States Court of Appeals, Tenth Circuit, that such court held that State Law should be applied in determining whether this case should be tried with or without a jury.

Therefore, we come to argue before this Court that the Federal Law should be applied, and that the United States Court of Appeals was in error in applying the State Law to a diversity case in the Federal Court, although we do not concede and will attempt hereinafter to show that under State Law the petitioner is entitled to a jury trial, but will first present here under Proposition 1 that the Federal Law and the Federal Constitution should control in determining the right to a jury trial in the Federal Court.

SUMMARY OF ARGUMENT

The decision below is unwarranted as we view it, and we actually feel that the Constitution itself is plain and unequivocal. There is here no question about a Demand for a Jury Trial. The petitioner demanded a jury trial when he filed his Complaint. He demanded a jury trial when he filed his Reply, and he again demanded a jury trial when he filed his Response to Motion for Summary Judgment.

While this Court has never passed squarely upon the question as to whether or not State Law or Federal Law

should control, but this Court has held, as we view it, in effect in several cases that the Federal Law and the United States Constitution should control in the United States Court.

In the case of *Dairy Queen, Inc., Petitioner v. Hon. Harold K. Wood, Judge, et al.*, decided April 30, 1962, 82 S.Ct. 894 and following, we quote from such opinion as follows:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts. In Scott v. Neely, decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit 'in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.'
>
> * * * * * *
>
> "The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' * * *"

In 79 S.Ct.Rep., page 1484, 360 U.S. 308, *Jackson D. Magenau, Administrator v. Aetna Freight Lines, Inc.*, Syllabi 3 and 4 are as follows:

"Under federal judicial system, determination of disputed questions of fact in civil common-law action is for jury.

"Where state practice rule requiring disputed factual issue to be tried to court is not an integral part of special relationship created by statute, federal court, in diversity case, should not follow state rule."

In the case of *Chicago, R. I. & P. R. Co. v. Cole*, 51 S.Ct. 383, 283 U.S. 91, 40 S.Ct. 68, the Court said:

"A state is not compelled by the federal Constitution or its amendments to maintain the familiar line between the functions of the jury and those of the court, but may do away with the jury altogether, modify its Constitution or the requirements of a verdict, or the procedure before the jury, and may confer larger powers on the jury than those generally prevailing."

In the case of *Allen v. Matson Navigation Company*, 255 F.2d 273, the Ninth Circuit, in Syllabus 10, said:

"The kind of jury trial to which parties are entitled in federal courts under federal rules is that preserved by Seventh Amendment, to which doctrine of Erie v. Tompkins is subservient, Fed. Rules Civil Procedure rules 38, 39, 28 U.S.C.A.; U.S.C.A. Const. Amend. 7."

We also quote from the body of the opinion as follows:

"We also note that while circumstances would not in our opinion alter results here, yet the sufficiency of certain evidence to raise a question of fact for jury should not be controlled by state law. 5 Moore's Fed. Practice 2d Edition Article 38.10 page 102."

See also to the same effect, *Pogue v. Great Atlantic & Pacific Tea Company*, 5 Cir., 242 F.2d 575, 582; *Wright v. Paramount-Richards Theatres*, 5 Cir., 198 F.2d 303, 305; *Reuter v. Eastern Air Lines*, 5 Cir., 226 F.2d 443, 445; *Reynolds v. Pegler*, 2 Cir., 223 F.2d 429, 433, 434. An examination of these cases, we think will convince the Court that these circuits are convinced that state law has nothing to do with determining right of trial by jury or kind of jury trial to which a litigant is entitled.

In the case of *Dick v. New York Life Insurance Company*, 79 S.Ct. 921, the Supreme Court said:

> "A decision as to which standard should be applied can well be left to another case which question is briefed and argued."

In the case of *Wright v. Paramount-Richards Theatres*, cited *supra*, the Fifth Circuit in Syllabus 1 said:

> "While federal Court of Appeals, as well as federal District Court for Louisiana district, is just another tribunal for interpreting and applying substantive law of Louisiana in personal injury actions of which such courts have jurisdiction solely because of diversity of parties' citizenship, federal courts are bound by federal constitutional amendment guaranteeing jury trial and providing that no fact tried by jury shall be reexamined in federal court otherwise than according to common law rules, which are not recognized by Louisiana, under civil law of which appellate court gives judgment on facts without jury's intervention. U.S.C.A. Const. Amend. 7."

In *Pogue v. Great Atlantic and Pacific Tea Company*, 242 F.2d 575, the Fifth Circuit in Syllabus 4 said:

"The kind of jury trial to which parties to a Florida negligence action tried in a federal court were entitled under rules of civil procedure was that preserved by Seventh Amendment to the Constitution. Fed. Rules Civ. Proc. rules 38, 39, 28 U.S.C.A., U.S.C.A. Const. Amend. 7."

In the case of *Bowie* v. *Sorrell*, 209 F.2d 49, the Court said in Syllabi 3 and 4 as follows:

"(3). Where separate trial was ordered on issue of validity of release pleaded by defendant as defense to tort action and attacked by plaintiff as being invalid because of fraud, plaintiff was entitled to jury trial on such issue. Fed. Rules Civ. Proc. rule 42(b), 28 U.S.C.A.

"(4). Question whether Plaintiff in tort action was entitled to jury trial in separate trial on issue of validity of release relied upon by defendant and attacked by plaintiff as being invalid because of fraud would be determined by federal law, not by state law. Fed. Rules Civ. Proc. rule 42(b), 28 U.S.C.A."

In *Beacon Theatres, Inc.* v. *The Honorable Harry C. Westover, Judge of the United States District Court of the Southern District of California*, 79 S.Ct. 948, 359 U.S. 500, the Court held in Syllabus 4 as follows:

"The Declaratory Judgment Act preserves right to jury trial for both parties. 28 U.S.C.A., Secs. 2201, 2202."

and in Syllabus 22 as follows:

"In federal courts, right to jury trial cannot be dispensed with, except by consent of parties entitled to it; nor can it be impaired by any blending with a

claim, properly cognizable at law, of demand for equitable relief in aid of legal action, or during its pendency. Fed. Rules Civ. Proc. rules 1, 2, 18, 39(a), 28 U.S.C.A.; 28 U.S.C.A., Sec. 2072; U.S.C.A. Const. Amend. 7."

In the case of *Jackson D. Magenau, Administrator* v. *Aetna Freight Lines, Inc.*, 79 S.Ct. 1184, 360 U.S. 308, Syllabi 3 and 4 are as follows:

"Under federal judicial system, determination of disputed questions of fact in civil common-law action is for jury.

"Where state practice rule requiring disputed factual issue to be tried to court is not an integral part of special relationship created by statute, federal court, in diversity case, should not follow state rule."

Herron v. *Southern Pacific Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857, was an action brought in the Federal District Court for Arizona to recover damages for personal injuries. At the close of plaintiff's case the court sustained the defendant's motion for a directed verdict upon the ground that plaintiff was guilty of contributory negligence. Plaintiff appealed. Section 5, Article 18, of the Constitution of Arizona provided that the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all time, be left to the jury. In view of this requirement, the Court of Appeals certified the following questions of law for the decision of the Supreme Court.

"First. Is the above provision of the constitution of the State of Arizona binding and controlling upon a

Federal court sitting in that State? Or, putting the question in another form:

"Second. May a Federal court sitting in the State of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?"

The Supreme Court answered the first question in the negative; the second in the affirmative.

MR. CHIEF JUSTICE HUGHES spoke for the Court:

"The State, without violating the requirements of due process, may provide such a rule for its own courts, as it may do away with the jury altogether (Chicago, Rock Island & Pacific Ry. Co. v. Cole, 251 U.S. 54, 56, 40 S.Ct. 68, 64 L.Ed. 133), but in view of its nature and effect, the rule cannot be regarded as one that relates merely to practice or to a 'form' or 'mode of proceeding.' The provision 'cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the court, upon a proven state of facts.' Atchison, Topeka & Santa Fe Ry. Co. v. Spencer, 20 F.2d 714, 716. Even with respect to the burden of proof as to contributory negligence, this Court has said: 'But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case . . . But the United States courts have uniformly held that as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle, even in trials in States which hold that the

burden is on the plaintiff.' Central Vermont Ry. Co. v. White, 238 U.S. 507, 512, 35 S.Ct. 865, 59 L.Ed. 1433. See, also, Beutler v. Grand Trunk Junction Ry. Co., 224 U.S. 85, 88, 32 S.Ct. 402, 56 L.Ed. 679.

"Nor is the provision applicable, which the appellant invokes, that 'the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' USC Tit 28, Sec. 725. *THE CONTROLLING PRINCIPLE GOVERNING THE DECISION OF THE PRESENT QUESTION IS THAT STATE LAWS CANNOT ALTER THE ESSENTIAL CHARACTER OR FUNCTION OF A FEDERAL COURT.* The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'rules of decision' Act . . ."

It would seem absurd to say that a state could pass a law which would take away from a citizen of the United States his right to a jury trial in the United States Court as guaranteed to said citizen by the Seventh Amendment. The rights guaranteed and given to a citizen by the Constitution of the United States cannot be altered, changed or modified by state law. The cases are too numerous to mention and recently written by this Court where states have attempted to pass laws to take from citizens their rights as guaranteed to them under the Constitution of the United States, and these cases have had primarily to do with the question of integration, and this Court has

consistently held that a state cannot pass a law which is anywise repugnant to or which takes or attempts to take from a citizen his or her rights under the Constitution of the United States.

Thus, as applied to this case, the Seventh Amendment gives to a person the right to a trial by jury in the United States Court. Therefore, it would be immaterial what the opinions of the state court are, or what the laws of the state in which the action arose are, with reference to a trial by jury for the reasons as heretofore stated. State laws and state constitutions can only apply to the procedure in the state courts, and can in nowise overrule or override the constitutional guarantee in the United States States Court of right to trial by jury.

The so-called letter of September 25, 1952, is not a contract but merely a letter which Mr. Conner prepared and had Mr. Simler sign, and which Mr. Conner did not sign, and in order to present the point here we wish to re-quote the letter as follows:

"Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

"Dear Sir:

"With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is to be paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"/s/ A. J. Simler"

It will be noted from a reading of this letter that it only applied under three conditions: First, the provision with reference to settling without trial. Second, the provision with reference to settling if tried in County Court or District Court; Third, the provision with reference to the Supreme Court of Oklahoma. However, since this letter was not signed by Mr. Conner, and since Mr. Conner was already obligated under the letter of July 18, 1952, to receive a reasonable fee for his services, there was absolutely no consideration for the second letter, because Mr. Conner was already bound by the first letter although he didn't sign it, but it must be assumed he accepted the employment under it to represent Mr. Simler to the best of his knowledge, skill and understanding. He could not do more than this, and therefore, the letter is void for the simple reason that there was no consideration whatsoever for it.

We call to the Court's attention the general principle of law to the effect that a promise to do what one is already bound to do is no consideration whatsoever. Corpus Juris Secundum, Volume 17, page 465, Article 112, is as follows:

> "SUBSISTING CONTRACTUAL OBLIGATIONS IN GENERAL. Generally the promise of a person to carry out a subsisting contract is no consideration as he is due no more than he was already obliged to do. The promise of a person to carry out a subsisting contract with the promise or performance of such contractual duty is really no consideration as he is due no more than he was already obliged to do and hence has sustained no detriment nor has the other party to the contract obtained any benefit. Thus a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promissor to perform is without consideration and this rule has been applied to building and construction contracts."

The Supreme Court of Oklahoma in *Watson* v. *American Creosote*, 184 Okla. 13, 84 P.2d 431, said:

> "An agreement to do or the doing of that which a person is already bound to do under a contract does not constitute sufficient consideration for a new promise."

The Court in the body of the opinion says:

> "At most it is only an agreement on the part of the plaintiff to do that which he was already obligated and bound to do and did not constitute a sufficient consideration."

Citing *Schuler* v. *Myton*, 48 Kan. 282, 29 Pac. 163, and *Harris* v. *Harris*, 9 Col. App. 211, 47 Pac. 481.

In the case of *Cuneo Press, Inc.* v. *Claybourn Corporation*, 90 F.2d 233, Court of Appeals, Seventh Circuit, said:

> "Promise contained in subsequent agreement to do that which one is already obligated to do confers no advantage on promissee, imposes no detriment on promissor and is without consideration."

The Court further said in Syllabus 2:

> "Consideration is necessary to support waiver or release of right whether accomplished by original instrument or by modification of existing contract."

In the body of the opinion the Court said "modification of a contract by subsequent agreement is subject to the rules governing all contracts. Consequently any promise therein contained to do that which one is already obligated to do confers no advantage on the promissee, imposes no detriment on the promissor and is without consideration." Citing many cases and quoting further from the same authority, in other words consideration is necessary to support a waiver or release of rights whether accomplished by an original instrument or by modification of an existing contract, citing many authorities. Consequently the letter of September 25, 1952, which was drawn by Mr. Conner and which letter purported to grant 25 per cent if settled without trial, 33 per cent if with trial in County or District Court, 50 per cent if won in the Supreme Court is absolutely void for lack of consideration.

Next, the letter is of no force and effect for the further reason that at the time it was signed by Mr. Simler, Mr. Conner was Mr. Simler's attorney, and the Supreme

Court of Oklahoma in the case of *Hauenstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552, said:

> "The main issue involved in this case was whether a new contract of employment was made between the parties. Plaintiff claimed that he turned this money over to defendant to be used in paying all claims listed in the bankruptcy matter, and that the residue, if any, remaining after paying said claims was to have been returned to him. Defendant contended that a new contract of employment had been made between himself and the plaintiff by which the plaintiff was to place in his hand the sum of $3,500, and that out of this sum the defendant was to pay the Hubbard judgment, which amounted to $1,115, and the balance was to be retained by defendant as attorney's fee for closing the bankruptcy proceedings and for defending the threatened criminal prosecutions. The jury by their verdict, decided the issue in favor of the defendant, as to the existence of the new contract, but awarded the plaintiff judgment for the sum of $1,259.15 instead of the sum prayed for in his petition."

The Court further said:

> "It is a well established rule of law that contracts between attorney and client to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, AND EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE." (Emphasis supplied.)

There is, as we view it, no way the letter of the 25th of September, 1952, should be considered in this case. As stated above, there was absolutely no consideration for it and it is, therefore, void. Next, it was made while the relationship of attorney and client existed between Mr. Conner and Mr. Simler, and the Oklahoma Supreme Court has passed squarely on such a case and holding that such, even if it should be construed to be a contract, was presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable. AND EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE. His letter of July 18 says he shall receive reasonable compensation for his services. Consequently, the second letter could not be of any force and effect and should be stricken from the consideration of the trial court for the reasons hereinabove indicated.

The case should be, as we view it, submitted to the jury under the evidence presented by the parties, and for the jury to determine what is reasonable compensation for the services performed by Mr. Conner.

We call to this Court's attention the case of *A. C. Rupp v. Cortland N. Cool*, decided by the Supreme Court of Colorado on May 29, 1961, and found in 362 P.2d at page 396. This was an action to recover a balance allegedly owing for legal services rendered by Cortland N. Cool, a practicing attorney, against his client, Rupp. The Supreme Court of Colorado reversed this cause and said in the body of the opinion as follows:

"Once the confidential relationship of attorney and client exists, the law governing contracts entered into between them is very different. The test applied to such contracts when the attorney seeks to enforce the same is well stated in 7 C.J.S. Attorney and Client Sec. 204(2):

> 'Where after the relationship has been established, an attorney and client enter into an agreement in reference to the attorney's compensation, * * * the burden is on him to prove that the agreement was fairly and openly made, was supported by an adequate consideration, and that he gave the client full knowledge of the facts and of his legal rights, when he entered into the agreement, and that the services to be performed were reasonably worth the amount stated in the agreement; * * *'

"It is quite apparent that at the time of trial Cool had come to a realization of the fact that he could recover only such amount as would constitute reasonable compensation for services rendered. No doubt such realization prompted his motion to amend, which motion was renewed after all testimony had been presented. The trial court committed reversible error in denying the motion, in rejecting tendered evidence with reference to the reasonable value of the services rendered, and in entering judgment for $1,581.26 without any proof as to the value of the services rendered.

"The remaining question presented for our resolution is: Was Rupp entitled to a jury trial?

* * * * * *

"Rule 38, R.C.P. Colo., provides:

> '(a) WHERE JURY RIGHT EXISTS. Upon demand, in action for the recovery of specific real or personal property, with or without damages, or

for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property. *AN ISSUE OF FACT MUST BE TRIED BY A JURY, UNLESS A JURY TRIAL IS THEREAFTER WAIVED.*" (Emphasis supplied by Court.)

In the case of *Cassel v. Gregori, et al.*, decided by the Appellate Department, Superior Court of Los Angeles County, California, and found in 70 P.2d beginning on page 721, the Court fixed the fee of plaintiff's attorney and required plaintiff to pay such fee. The plaintiff appealed and the case was reversed. This Court said in the syllabus as follows:

"2. Although a law is 'general' and constitutional when it applies equally to all persons embraced in a class founded on some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privilege or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.

"3. A statute authorizing the court to fix the compensation of an attorney who is withdrawing from a case in which his fee is contingent on the recovery of money is void since it establishes an arbitrary classification in violation of constitutional requirement that all laws of a general nature shall have a uniform application.

"4. The right of trial by jury secured by the Constitution is the right as it existed at common law at the time the Constitution was adopted (Const. Art. 1, Sec. 7).

"5. A statute authorizing the court on application of an attorney to fix the attorney's compensation in a case from which the attorney is withdrawing and in which his fee is contingent on the recovery of money infringes the constitutional guaranty of trial by jury. (Code Civ. Proc. Sec. 284, as amended by St. 1935, p. 1647; Const. Art. 1, Sec. 7.)

"6. Any act of the Legislature attempting to abridge the constitutional right of trial by jury is void. (Const. Art. 1, Sec. 7.)

"7. Although the constitutional guaranty of a trial by jury does not secure the right in special proceedings, the Legislature may not at will create new forms of special procedure, and parcel out among them the subject-matter of ordinary actions at law previously triable by jury, and thereby whittle away the right to a jury trial (Const. Art. 1, Sec. 7)."

And in the body of the opinion the Court said:

"The rule on the matter of classification is well settled, and was stated thus in the early case of Pasadena v. Stimson (1891) 91 Cal. 238, 251, 252, 27 P. 604, 607, 'The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' This rule has been adhered to ever since it was thus declared. (citing numerous cases).

"Applying this rule to the present case, and passing by the question whether contingent fee cases as a whole would constitute a separate class justifying special provisions regarding attorney's fees, we entertain no doubt that the special classification of contingent fee cases made by this statute is arbitrary and invalid.

* * * * * *

"We think that, when applied to such a case as we have here, it also infringes the constitutional provision for trial by jury. The right of trial by jury which is secured by section 7, article 1, of the Constitution, above quoted, is the right as it existed at common law at the time our Constitution was adopted.

"* * * This does not mean, however, that the Legislature may at will create new forms of special procedure, parcel out among them the subject-matter of the ordinary actions at law heretofore triable by jury, and thereby whittle away the right to a jury trial. * * *.

"The order appealed from is reversed, with costs of appeal to the appellant."

Conclusions as to First and Second Questions Presented

We therefore most respectfully urge that the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure, and the Laws of the United States govern in determining whether or not a litigant is entitled to a jury trial in the United States District Court, and the State Statutes or opinions of the State Supreme Court have no application whatsoever, and that

clearly under the facts as shown by the pleadings in this case, the petitioner, A. J. Simler, is entitled to a jury trial in this case.

Under Oklahoma Law the Plaintiff Is Entitled to a Jury Trial

We now call to the Court's attention the Oklahoma authorities in relation to a jury trial. Counsel sought and was granted in this Court an order requiring the Circuit Court to re-examine its former opinion after *Southard* v. *MacDonald* (Okla.), 360 P.2d 940, was handed down by the Supreme Court of Oklahoma. We wish to call to the Court's attention that *Southard* v. *MacDonald*, as we view it, has no application to the facts reflected by the pleadings in this case. The Supreme Court of Oklahoma in discussing the case quotes Section 556, 12 Oklahoma Statutes as follows:

> " 'Issues of fact arising in actions for * * * recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference * * * ordered, as hereinafter provided.'
>
> "We find that the cases cited by the plaintiffs are different from the case here involved, because the primary issue in the cases cited was the recovery of specific real and personal property.
>
> * * * * * *
>
> "Are plaintiffs entitled to a jury trial because they sought to recover money from MacDonald? In Howard v. Stanolind Oil & Gas Co., 197 Okl. 269, 169 P.2d 737, 741, we said:

> 'It is well settled that an action, the primary purpose of which is to set aside deed conveying real estate and obtaining a decree re-investing title in plaintiffs, is one of equity and in such action neither party is entitled to a jury. Stow v. Bruce, 178 Okl. 127, 61 P.2d 1403.'

"Again in paragraph 1 of the syllabus in Ward v. Lindly, Okl., 294 P.2d 296, we said:

> 'In action by grantor's heir to cancel deed, because of grantor's incapacity, and for possession of the premises, neither party was entitled to jury trial on theory that cause of action was primarily one for possession of the land, since heir was not in a position to bring action for possession until deed was canceled and the action was one of equitable cognizance.' * * *"

Without discussing this case further, we call to the attention of the Court that the Supreme Court of Oklahoma in the *Southard* v. *MacDonald* case cited with approval *Haunstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552. Since the issue presented in this partition suit where it was sought to divide the land in *Southard* v. *MacDonald*, and some of the heirs asked to have the deed cancelled which had been given to MacDonald for attorney's fees, the Court in effect held that it was actually a suit to cancel a deed and therefore no jury was required. This has always been the holding of the Supreme Court of Oklahoma that a suit to cancel a deed is an equity matter. There is no deed involved in this case. The petitioner is merely asking the court to determine how much, if any, he owes to his former attorney, and the attorney filed a cross-complaint

asking for specific real property or personal property as selected by the Answer and Cross-Complaint herein, and under Section 556, 12 O.S.A., and all the holdings of the Supreme Court of Oklahoma on the subject, clearly show that the petitioner is entitled to a jury on the issues as thus raised by the pleadings.

The Supreme Court of Oklahoma in the case of *Wolfe v. Campbell*, 107 Okla. 112, 230 Pac. 505, said:

> "ISSUE AS TO WHAT IS REASONABLE ATTORNEY'S FEE FOR JURY. In such action the issue as to what would be a reasonable attorney fee for services rendered is an issue of fact to be determined by a jury from the evidence. The court further said in an action for specified attorney fee where issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land. In such case, the jury may properly determine the issue of fact and return a verdict for what it finds to be a reasonable fee, the court may then render judgment for the amount of the verdict, and, in the exercise of its equity powers, decree a lien against the defendant's land for the satisfaction of the judgment. The fact that decreeing a lien calls for the exercise of equity powers by the court does not take from the jury the power to first determine the issue of fact as to what fee is reasonable, a determination of the fee being the foundation of the right to a lien."

We quote from the body of the opinion:

> "This was a suit for the recovery of a money judgment, $2,000.00 attorney's fee. Under Section 532, C. L. 1921, the amount in controversy being an issue of fact arising in an action for the recovery of money, de-

fendants in error were entitled as a matter of right to a jury verdict. Said Section 532, together with Section 533, id., being the sections of our Code which provide what issues may be tried to a court and what issues as a matter of right must be tried to a jury, unless waived, read as follows:

"Section 532. 'Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.'

"Sec. 533. 'All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury or referred as provided in this Code.'

"Hence the action being for the recovery of money, and the issue as to what amount, if any, should be recovered, being an issue of fact arising out of an action for the recovery of money, it was properly an issue to be determined by the jury, and the testimony as to the value of services being in conflict, plaintiff's attorneys testifying what they were worth, and defendants' attorneys testifying that they were worth less, the jury being judge of the credibility of the witnesses and weight of the testimony, its verdict will not be disturbed, if reasonably supported by the evidence, following the rule in Snyder v. Stribling, 18 Okl. 168, 89 P. 222, and Wallingford v. Alcorn, 75 Okl. 295, 183 P. 726."

In the case of *Opperud v. Twedell*, 175 Okla. 191, 51 P.2d 799, the Supreme Court of Oklahoma speaking on the subject said in the body of the opinion:

"A comprehensive examination of the evidence introduced in behalf of the plaintiff shows it to be sufficient, if accepted as true, to warrant a conclusion that the plaintiff was employed by the defendant to transact the business of others as well as her own and that the plaintiff had not been paid in full for the services thus rendered. That is, it was sufficient to present a disputed question of fact which should have been submitted to the jury. Whether the jury would accept the evidence and resolve the disputed question in favor of the plaintiff is, of course, an entirely different question."

As heretofore quoted, Title 15, Oklahoma Statutes Annotated, Section 60, is as follows:

"Actual fraud is always a question of fact."

The Supreme Court of Oklahoma in *Operators Royalty & Producing Co.* v. *Greene*, 173 Okla. 383, 49 P.2d 499, said in Syllabus 5 by the Court:

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or non-existence of such fraud becomes a question of fact for the jury to determine, under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict."

In the body of the opinion the Court said:

"'Fraud' is a generic term, which embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions or by the suppression of the truth. No definite and invariable rule can be laid down, as a general proposition defining

fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. Hawkins v. Bryan, 128 Okl. 27, 261 P. 167.

"The evidence being sufficient to carry to the jury the issue of fact as to the existence or nonexistence of fraud, the verdict of the jury upon such issue of fact will not be disturbed by this court, if the issue was submitted to the jury under proper instructions.

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict. Illinois Oil Co. v. Pender, 137 Okl. 82, 277 P. 1026; Hall v. Smith, 126 Okl. 206, 259 P. 537."

In *Illinois Oil Co.* v. *Pender, et al.*, 137 Okla. 82, 277 Pac. 1026, the Supreme Court of Oklahoma in Syllabus 1 by the Court said:

"FRAUD IS QUESTION OF FACT FOR JURY; JURY'S FINDING ON QUESTION OF FRAUD WILL NOT BE DISTURBED ON APPEAL IF SUPPORTED BY EVIDENCE.

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict."

In the body of the opinion the Court used this language:

"This evidence was certainly sufficient to go to the jury on the question as to whether or not this con-

tract was a joint contract. The jury evidently found against the defendant on this issue. It was properly instructed relative thereto, and, there being evidence reasonably tending to support such finding, the same will not be disturbed by this court on appeal. There was no error in denying defendant's motion for a peremptory instruction."

In *Societe Titanor* v. *Sherman Machine & Iron Works*, 172 Okla. 213, 45 P.2d 144, the Court said in Syllabus 1 by the Court:

"Fraud in procuring the execution of a written contract is a question to be determined by the jury under proper instructions, and where the evidence reasonably tends to support the verdict thereon, the same will not be disturbed on appeal."

In the body of the opinion the Court said:

"* * * The defendant says that such was its position in the transaction, and that it relied upon the statements and representations of the plaintiff when it signed the order, and that such statements and representations were fraudulent and resulted in the signing of the contract.

"This amounts to a direct charge of positive fraud. Active, positive fraud is always recognized as a defense in a suit on contract; and whether the defendant was deceived by the alleged misrepresentations of Rossant was a question for the jury. Mount Hope Nurseries Co. v. Jackson, supra."

In *Morris, et ux.* v. *McLendon, et al.*, 167 Okla. 68, 27 P.2d 811, the Supreme Court of Oklahoma in syllabus by the Court said:

"It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff, that the court is authorized to direct a verdict for the defendant; and, unless the conclusion follows, as a matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions.

"Record examined, and held, that the trial court erred in directing a verdict for defendant."

In the body of the opinion the Court said:

"* * * It was for the jury, instead of the court, to weigh the acts of the parties, their statements and relationships. The court therefore committed error in taking said cause from the jury.

"The judgment of the trial court is reversed, and the cause remanded, with directions to grant a new trial."

CONCLUSION

The petitioner urges that under either Federal or State Law the petitoner is entitled to a jury trial in this cause.

Clearly, the petitioner feels that under the Federal Constitution and Laws of the United States this matter should be determined, but in case the Court should hold that State Law controls as to the determining of the jury question, under the authorities cited immediately above, we feel there can be no question but what the petitioner is entitled to a jury trial. The Statutes of Oklahoma and

the opinions of the Supreme Court construing the same, the Constitution of Oklahoma plainly give the petitoner the right to a jury trial in this case.

There actually has never been a contract signed between the client, Mr. Simler, and his former attorney, Mr. Conner. It must be assumed that Mr. Conner accepted the employment under the letter which he prepared dated July 18, 1952, and this letter provided for a reasonable attorney's fee. There is no way known to secure more than a reasonable attorney's fee, and consequently, the second letter prepared by Mr. Conner, under the circumstances shown by the pleadings, was a complete nullity because Mr. Conner in preparing this letter attempted to change or modify the previous letter of employment without any consideration whatsoever therefor on either the part of Mr. Conner who was already bound after he accepted the employment to represent Mr. Simler. In addition to the above, the case was never won in the Supreme Court of Oklahoma or in the County Court or District Court of Oklahoma. Consequently, the letter of September 25 could have had no application whatsoever.

In addition to the failure of consideration and the fact that the letter is presumptively fraudulent, and the fact that it had no application to the facts in this case, said letter was further void for the reason that it was simply a letter and not a contract, and not one place in the entire record did Mr. Conner ever sign any contract or agreement or letter purporting to do anything for Mr. Simler, and certainly the letter of the 25th of September could

not be construed as a contract for the reasons hereinabove set forth.

Since the letter of July 18, 1952, provides for a reasonable attorney's fee, we feel that this case should simply be submitted to the jury under instructions for the jury to determine in this case what is a reasonable attorney's fee. Of course, Mr. Conner will be given a full and complete opportunity to present to the jury the amount of work, the matters involved, and so forth, and Mr. Simler will likewise be permitted to offer testimony along the same lines, and both sides can testify as to what they think a reasonable fee should be in the case, and the jury should then determine the matter and this should conclude this litigation.

We therefore most respectfully petition and ask this Honorable Court to issue its opinion, order and judgment in this case reversing said cause and directing the United States District Court for the Western District of Oklahoma to grant to the petitioner a jury trial, to which he is so justly entitled.

Respectfully submitted,

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October, 1962.

CERTIFICATE

I certify that I mailed a true and correct copy of this Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, to Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma, and to Phil Daugherty, 219 Couch Drive, Oklahoma City, Oklahoma, and Peyton Ford, 1000 Connecticut Ave., N.W., Washington, D.C., by depositing the same in the United States mail with sufficient postage attached thereto on this, the 5th day of October, 1962.

.....

Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

On Writ of Certiorari to the Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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IN THE

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OCTOBER TERM, 1962

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A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

On Writ of Certiorari to the Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinions of the Court of Appeals for the 10th Circuit are reported at 282 F. 2d 382 (1960) and 295 F. 2d 534 (1962).

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. 1254(1). The petition for certiorari was granted by this Court on January 15, 1962, 82 S. Ct. 440.

STATEMENT OF THE CASE

A. J. Simler, petitioner herein, retained Leslie L. Conner, an attorney and respondent herein, to contest a will under which Simler had been bequeathed "the sum of $1.00" by his sister. The two executed a letter contract on July 18, 1952, setting out various terms of their attorney-client relationship and providing, in part, for payment to Conner and his firm of "a reasonable attorneys fee. . . ." Two months later, after some preliminary work and investigation by Conner, the two parties executed a second instrument, providing in relevant part:

". . . I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if the case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes, and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler."

The quoted instrument, or letter, was signed by Simler in Conner's Oklahoma City, Oklahoma office.

with Mr. Arnold Britton, a legal associate of Conner, also present.

In the performance of his responsibilities, Conner (and other attorneys sometimes retained by him for particular jobs) litigated on Simler's behalf in an Oklahoma county court, intermediate court and Supreme Court; and personally conducted a federal action lasting from October 14, 1952 through May of 1957. The major result of his labors was that the Oklahoma County Court awarded Simler title by intestate succession to an Oklahoma farm, Conner having successfully contended before it that the named devisee under the sister's will was ineligible.

In 1958 Simler filed a declaratory action in the federal district court for the western district of Oklahoma, on diversity jurisdiction, seeking a judicial declaration as to the extent of his liabilities under his contract with Conner, if any, beyond what amounts he had already paid. Defendant Conner counterclaimed for an undivided one-half interest in the Oklahoma farm, on the theory that this represented "50% of the amount recovered" as contemplated by the September 25 letter above. Later, Conner moved for summary judgment pursuant to Federal Rule 56. After conducting three hearings on this motion and examining various depositions, pre-trial admissions and affidavits, (collected in the Appendix to this brief) the trial judge granted the motion.

From this decision a somewhat tortuous pattern of appellate litigation ensued.

First, Simler appealed to the Court of Appeals for the 10th Circuit, which reversed the trial court decision, seemingly on the ground that Oklahoma law dictated

a jury trial on the question of whether there was fraud in execution of the September 25 letter.[1] Conner then petitioned the Supreme Court for review of the 10th Circuit opinion by writ of certiorari. Initially denied, the petition was later granted on rehearing. The Supreme Court summarily remanded the case to the 10th Circuit for reconsideration in light of *Southard* v. *MacDonald* (Okla.) 360 P. 2d 940 (1961), a recent decision by the Oklahoma Supreme Court. On remand, the 10th Circuit reversed its earlier opinion on the strength of *Southard*, which held that Oklahoma law afforded no right of jury trial to a litigant seeking to set aside an attorney's contingent-fee contract, as a prerequisite to determining *quantum meruit* liability of the client. Characterizing the action below as of the same class, the 10th Circuit decided in obeisance to state law.

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[1] In analyzing state law, the Court stated:

"A fair analysis of the decisions of Supreme Court of Oklahoma establishes that court recognizes and follows the general rule that a contract for compensation of an attorney . . . is valid and enforceable if executed freely, voluntarily and with full understanding of the client. The voluminous record in this case indicates, the vast amount of labor, skill and time spent by the attorneys in connection with different cases which reached the appelate courts of the State of Oklahoma and the federal judicial system. We do not intend to minimize the value of these services or to say that the contingent fees provided for in the September 25th letter are unreasonable, but we are convinced that under well established principles of law in Oklahoma, the case should have been submitted to a jury on the question of whether the September . . . contract was fair, just and equitable and free from fraud." 282 F. 2d 386.

Thereafter, Simler filed a petition for certiorari with this Court, which was granted on January 15, 1962. In the petition Simler asserted that the question presented for review was:

> "Should the question of right to trial by jury be determined by the Federal Rules of Civil Procedure and the Laws and Constitution of the United States in a diversity case, or should such right be determined by the law of the State in which the case is being tried?"

It is this petition that is now at bar for this Court's consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

In reading petitioner's brief, Respondent feels somewhat akin to Thomas Paine when confronted with Edmund Burke's Reflections on the French Revolution, a work the former later described as a "pathless wilderness of rhapsodies." Rather like a galaxy of tangents, the diverse arguments heaped together in the brief have lead respondent to an earnest bewilderment, though attempting with the utmost seriousness to follow them. Because of this, Respondent feels compelled to jettison traditional form and put his argument in proper perspective by a few prefactory remarks.

It is axiomatic that without disputed issues of fact there is no basis for a jury trial. Since in such cases as the present one it is of first importance to understand what is *not* in dispute, Respondent wishes to delineate quickly the *conceivable* "issues" below and explain why two of these may be immediately winnowed from this Court's consideration. When distilled, Petitioner's voluminous pleadings yield only three conceivable "issues" of fact which might have

undercut the propriety of summary judgment or have necessitated a jury trial. These are:

1. Overreaching or fraud in the execution of the September instrument, *i.e.*, fraudulent inducement of Simler's signature thereto. 2. No intention by Simler to be bound by the words of the September instrument, or to regard it as ancillary to the July agreement. 3. The reasonableness of the 50% fee, quite apart from fraudulent execution of the instrument.

Potential issues (2) and (3) are quickly disposed of. Having admitted his execution of the September paper and its contents as plead by Conner, Simler could not raise a fact issue by a plea that he did not "intend" to be bound by the words as written or to treat the September instrument as ancillary to the earlier July agreement. Construction of the instrument was naturally a task for the court. *Seira* v. *Brewers' Refrig. Machine Co.*, 141 U.S. 510, 517 (1891); *Levy* v. *Gadsby*, 3 Cranch 180 (1805); *Gray* v. *Brunetti Const. Co.*, 266 F. 2d 809 (3d Cir. 1959). There can be no doubt that the language fairly supported the conclusion that it obligated Simler to pay Conner 50 percent of whatever Simler recovered as a result of his attorney's efforts. Fifty percent of this recovery—it is nowhere disputed—translated into an undivided one-half interest in the Oklahoma farm. Simler was therefore foreclosed from raising any fact issue by the bald assertion that he did not "intend" to be bound by the words as written, or to treat the September instrument as ancillary to, and an amplification of, the earlier June agreement. This is true because such pleas could not, as a matter of law, constitute a defense to the unambiguous language of the instrument once the latter was conceded to have been executed. A

mere subjective reservation, or unwillingness to be "bound" by such an instrument, is, under the most fundamental principles of contract law, not a legal defense at all. A defense that is bad as a matter of substantive law could not possibly have raised any factual issues.

As to potential issue (3), the first and most important consideration is that it is grounded upon an assumption that internal Oklahoma law affirmatively outlaws attorney-client fees that are more than "reasonable," notwithstanding they are prescribed in an otherwise lawful contract. Such an assumption is nowhere asserted or proved by petitioner, either below or in its brief before this Court. In any event, the recent decision of *Southard* v. *MacDonald*, *supra*, makes it plain that such an assumption is *not* the substantive law of Oklahoma. The only precedent Respondent could cite for its underlying premise is *Haunstein* v. *McAlister*, 172 Okl. 613, 46 P. 2d 552. But, in the subsequent *Southard* opinion the Oklahoma Supreme Court stated: "Since we hold that the deed and attorney-client contract are binding, there is no necessity to discuss the value of the service on *quantum meruit*." In a separate concurrence to the 10th Circuit's dismissal of the instant case on reconsideration, Judge Lewis stated quite clearly that *Southard* had overruled *Haunstein*, observing "... the opinion ... in Southard indicates that there is *no factual element of reasonableness* necessarily inherent in the searching scrutiny required in determining the validity of a contingent fee contract made between attorney and client...." (Emphasis supplied) 295 F. 2d 535.

This leaves only potential issue (1), and this, indeed, is the heart of the case so far as legal questions now

confronting this Court are concerned. Respondent's position is that Petitioner was not entitled to jury trial below on the alleged issue of fraud or overreaching in the execution of the September instrument. For this there are two distinct reasons. The first is that summary judgment, being a permissible practice in diversity cases even if the forum state lacks a counterpart, was properly implemented below. While the cry of "fraud" in the pleadings below could be said to have framed an issue in the abstract, it proved to be no more than a sham in fact. One of the more salutary results of the summary judgment practice under Rule 56 is to pierce such feigned issues. The second reason is that, regardless of whether the plea of "fraudulent inducement" was a sham, Petitioner nowhere asserted the kind of claim before the trial court that gives rise to a jury trial right under the Seventh Amendment. The Amendment assures such jury trial rights only to those claims which enjoyed similar rights at common law in 1791, when the Amendment was adopted. Simler's claim, as it stood before Conner's counterclaim, had no counterpart at common law, hence was not triable to a jury as of right. Simler's claim, after he had responded to the counterclaim, was for the reformation or cancellation of the September instrument. Actions to reform or set aside written instruments or contracts are traditionally equitable, both in federal courts and in most state courts, and thus include no right of jury trial. See 9 *Am. Jur.* §§ 4, 6; 5 Moore, Fed. Practice & Procedure 183 and cases there cited.

* * *

Petitioner evidently wants this Court to decide the large question of whether the Seventh Amendment of the United States Constitution secures a right of jury trial to litigants in diversity cases notwithstanding the

Erie-Guaranty doctrine. A logically prior question, however, is whether the summary judgment award by the district court was proper and, correlatively, whether federal or state law sets the standards by which a federal judge, sitting in diversity, rules on motions for summary judgment. This is a particularly appealing question in the instant case because Oklahoma has no summary judgment rule analogous to that in Federal practice. If this Court were persuaded that the summary judgment below was justified—on whichever standards were held applicable—then the Seventh Amendment question would not arise.

Because this Court has repeatedly emphasized its desire to avoid Constitutional questions if fairly possible, *Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450 (1945); *C.I.R.* v. *Wheeler*, 324 U.S. 542 (1945); *Arkansas Louisiana Gas Co.* v. *Dept. of Public Utilities*, 304 U.S. 61 (1938); *Hoyal* v. *Kansas*, 258 U.S. 181 (1922); *Arkansas Fuel Oil Co.* v. *Louisiana ex rel. Maxlow*, 304 U.S. 197 (1938); *Cummings* v. *Merchants' Nat. Bank of Toledo*, 101 U.S. 153 (1880), respondent assumes it would welcome a course of Constitutional avoidance in the instant case. Accordingly, respondent chooses to discuss first the non-constitutional ground on which the present action can be disposed, then the Seventh Amendment question.

ARGUMENT

I. THE FEDERAL SUMMARY JUDGMENT RULE IS APPLICABLE IN DIVERSITY CASES ACCORDING TO "FEDERAL" STANDARDS REGARDLESS OF STATE LAW, AND WAS PROPERLY APPLIED BELOW.

A. Summary Judgment Is Permissible in Diversity Cases Under the Federal Rules, Regardless of Whether the Forum State Allows a Similar Practice.

Since 1938 it has been settled that in diversity cases federal courts must look to the forum state for applicable substantive law and to federal standards for matters of procedure. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). In 1945 this court, when deciding *Guaranty Trust Co. of N. Y.* v. *York*, 326 U.S. 99, 109 (1945), added a gloss to the *Erie* doctrine. Speaking through Justice Frankfurter, the Court there remarked that in federal courts adjudicating diversity cases "The outcome of the litigation . . . should be substantially the same, so far as legal rules determine the outcome . . . as it would be if tried in a State Court." Thus was minted the oft-quoted "outcome determinative" standard for use in diversity cases. *Cf. Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198 (1956); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, (1949).

Respondent's position here is that implementation of Rule 56 in diversity cases does not run afoul of the outcome-determinative test; but, alternatively, that if it should be taken to do so, use of the rule would nonetheless be perfectly justifiable, in light of *Byrd* v. *Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958), because of affirmative federal policies in favor of such a course.

Though the summary judgment procedure is unknown to internal Oklahoma law, it is an integral part of federal practice. Rule 56 was promulgated in 1938, pursuant to the Federal Rules enacting Act of 1934.

and was thus binding by law upon all federal courts? It empowers a trial judge, on motion, to grant summary judgment for a litigant where there are no substantial issues of fact in dispute. The rule reflects a policy of expeditious judicial administration to the extent compatible with due process and fair treatment of the parties.

The rule should certainly be as usable in diversity cases as in those grounded upon other jurisdictional bases. The *Erie-Guaranty* doctrine should make no difference. For this conclusion there are several sound reasons.

To begin with the most obvious, the division of function as between judge and jury has traditionally been considered a "procedural" matter in American law generally. This is clearly true, for example, of conflicts of law decisions. *Ettlson v. Metropolitan Life Ins. Co.*, 137 F. 2d 62 (3d Cir. 1943) ("In conflict of laws cases the question whether an issue of fact is to be tried by a court or by a jury is considered one of procedure, and governed by the internal law of the forum"); Restatement, Conflict of Laws (1934) § 594; 3 Beale, Conflict of Laws (1935) § 594.1. It is as patently clear as anything in this troubled substantive versus procedural conflict can be, that rules bearing on how or before what agency a question is resolved are part of an overall mode of enforcing a right, but are readily distinguishable from the "right" itself. The summary judgment procedure, in turn, must surely be considered purely as part of the enforcement machinery of federal courts. It would perhaps be anomalous to regard it as anything but "procedural" inasmuch as the summary judgment practice is codified in the Federal Rules of Procedure, and the Rules Enabling Act "... was

purposely restricted in its operation to matters of pleading and court practice and procedure. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941). Moreover, in pronouncing Rule 56 a rule of "procedure" the Supreme Court merely followed the mainstream of Anglo-American jurisprudence. Summary judgment practice is but a variation of the same theme long sounded by the common law, which endorsed judgment *non obstante veredicto* and motions in arrest of judgment on a verdict where pleadings showed no material issue of fact requiring a trial or a verdict. *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 382 (1913) and cases there cited.

The summary judgment rule, then, is both functionally and traditionally a matter of "procedure" as distinguished from "substantive law." So much is beyond dispute. Granted this, can it yet be said that the rule must be excised from those applicable to federal diversity cases because it could substantially affect the outcome of some particular cases? The immediate answer to such a query is that any federal rule—even the local no-smoking rule—may contribute substantially toward the outcome in any given case. But there is a perfectly sensible reply available to the question without reducing the "outcome-determinative" test to an absurdity. The "outcome-determinative" test must be applied with an eye to reason and common sense. Viewing it as a rule of reason rather than one of logical absoluteness, it seems altogether proper for the federal summary judgment rule to fall outside the zone of the outcome-determinative test. In the instant case, for example, the granting of summary judgment appears every bit as appropriate as granting a directed verdict, as a state tribunal might very well have done. An ap-

praisal of the record indicates that a directed verdict would have been quite probable, had petitioner's witnesses actually testified in accordance with their depositions. (See appendix) In the circumstances of this *actual case*, at least it makes little sense to talk about the purely hypothetical difference in result that use of the federal rule might have made.

Beyond this, there are strong affirmative policies favoring use of the rule in diversity cases, even if it may sometimes affect results of cases. In *Byrd* v. *Blue Ridge Rural Elec. Co-op.* 356 U.S. 525 (1958) this court held that in trying a diversity negligence suit before a federal district court the employer's defense of statutory immunity had to be tried according to federal jury trial rules notwithstanding that the form state law required trial of such defenses before the court. This Court there squarely rejected the argument that the *Erie-Guaranty*, or "outcome-determinative" test must be mechanically applied simply because a diversity case was involved. It assigned two basic reasons: (1) the state rule requiring non-jury trial was not intimately bound up with the substantive defense itself and (2) the "affirmative countervailing considerations" of policy, notably the principle that the independent federal judiciary distributes trial functions between judge and jury under the influence of the Seventh Amendment. Both policies apply here. *Byrd* has since been read to mean that the "outcome-determinative" standard is not dispositive alone, but that a second question ever present is whether there are countervailing considerations "reflecting substantial federal policies which outweigh in the final balance the aim of like result." *Monarch Ins. Co. of Ohio* v. *Spach*, 281 F. 2d 401, 406 (5th Cir. 1960). In *Monarch*, where

the court held the federal rule on admissibility of evidence to prevail over a contrary state statute, the Fifth Circuit found just such a federal "countervailing policy consideration in the *Blue Ridge* sense," it said, "in" the historic purposes of the Federal Rules and the forces which led Congress to pass the Rules Enabling Act. The broad aim, especially in fields of practice, was to reverse the philosophy of conformity to local state procedure and establish, with but few specific exceptions, an approach of uniformity within the whole federal judicial trial system." On much the same grounds, the First Circuit has upheld use of the Federal impleader practice of Rule 41 in a diversity case even though impleader was unknown to the forum state law. *D'Onofrio Const. Co.* v. *Recon Co.*, 255 F. 2d 904 (1st Cir. 1958).

The policy expressed in the Rules themselves is certainly an overriding policy in the instant case on the side of affirming the power of the district judge below to use Rule 56. To hold otherwise would mean that summary judgment could never be granted in a diversity case if the forum state's practice did not perfectly reflect that found in Rule 56, thus defeating the entire policy of federal conformity in procedural matters. It would overlook the argument that ": . . so long as Congress opens the national courts to cases 'between citizens of different States,' . . . it would seem that they are entitled to the essentials of a trial according to federal standards," *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541, 545 (3d Cir. 1953 concurring opinion).

Finally, if is of cardinal importance to note that if in this case a mechanistic "outcome-determinative" test prevails over the policies underlying one of the

important Federal Rules, it would portend inevitable inroads upon the rights of diversity litigants, in other cases, to such salutary "federal" procedures as the declaratory judgment, interpleader, impleader, forum non conveniens, etc. Ascribing such talismanic power to the "outcome-determinative" test would, in Judge Clark's phrase, "prove too much." *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F. 2d 508, 513 (2d Cir. 1960).

For these reasons, Respondent thinks it plain that the soundest approach is that Rule 56 was quite properly employed in the case at bar by the federal district judge, either on the theory that its usage does not fail within the outcome determinative test or, if it does, that the affirmative federal policy underlying the rules generally and Rule 56 especially outweighs any competing policies.

B. Summary Judgment Was Properly Applied Below

Granted that Rule 56 is available to federal district courts in diversity cases on the same terms as in others, the only question outstanding is whether it was *properly* applied below. As to this, there can be little doubt.

The rule provides that summary judgment shall be granted on motion "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." That these conditions were fulfilled is best illustrated, of course, by an examination of the record below.

The only matter as to which there might conceivably have been a disputed issue of material fact was the execution of the September instrument. In sustaining

Respondent's motion for summary judgment, the trial court addressed itself squarely to this issue, stating "... there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence ... and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would form any basis to set aside or disregard the letter as a part of the contract between the parties."

In addition, the trial judge conducted three separate hearings on the motion and, according to his order, "carefully reviewed and examined the depositions of plaintiff, defendant and others, the exhibits, transcripts, pre-trial admissions and the entire record in this cause, ..." What the Judge examined might understandably have led him to conclude that the issue of "fraud in the execution" had been feigned in the pleadings and was a sham rather than a genuine question. Of course, one of the more salutary functions of the summary judgment rule is to pierce sham pleadings and determine whether there is a real issue at all. *Suckow Borax Mines Consolidated* v. *Borax Consolidated*, 185 F. 2d 196, 205 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951). The federal courts may properly employ the rule to look through allegations of fraud in the execution or inducement of a written instrument. *Port of Palm Beach Dist.* v. *Goethals*, 104 F. 2d 706 (5th Cir. 1939). There is, further, no particular magic in the fact that a contingent fee was at stake below in a dispute between an attorney and client. While in the nature of things relatively infrequent, the recent case of *Gray* v. *Brunetti Const. Co.*, 266 F. 2d 809 (3d Cir. 1959), involving suit by an attorney on a contingent fee contract, was this type of case. After

testimony the court withdrew the case from the jury and chose to treat two earlier motions for directed
4 verdicts as motions for judgment. It granted the plaintiff's motion, having itself found that the contingent fee agreement was entered into with full disclosure and without "fraudulent or unfair conduct on the part of the attorney." In this the trial court was upheld by the Third Circuit. In this, it should be added, the decision mirrors quite accurately the situation before the trial court in the case now at bar.

As viewed by the Court below, there was evidently no genuine issue as to the execution of the September instrument. As to the surrounding circumstances, *e.g.*, age of Simler, setting in which the instrument was executed, conversation, terms of the instrument, *etc.*, there was no dispute between the parties. Whether these various data constituted "fraud" in the legal sense was an ultimate question for decision by the court, but the primary facts, on which such a decision had to be predicated, *were not in dispute at all.* In this sense the decision was analogous to *Walker v. U.S. Gypsum Co.*, 270 F. 2d 857 (4th Cir. 1959), where an ultimate issue was a plaintiff's "employment status," a matter necessarily a function of certain primary facts or data. Finding no dispute as to the latter, the Court granted summary judgment, observing that "[i]t certainly does not follow . . . that, if there is no issue of fact genuinely in dispute, the question of employment status must be submitted to a jury." (860).

Furthermore, Petitioner never brought forward evidence at any of the three hearings on the motion for summary judgment which could persuade the trial Judge that the framed issue was not actually a sham.

No doubt the bare allegation of "fraud" or "overreaching" framed a formal issue in the pleadings, but a signal objective of summary judgment procedure, Respondent reiterates, is to pierce such formal "issues" to see if they are real. Only if they are does the question of a jury trial right ever arise. No conceivable "issues" in the case below *were* real, in this sense. Accordingly, entry of summary judgment was altogether fitting and proper. On this basis this case can now be decided by this Court in Respondent's favor with no need—logical, moral or otherwise—to proceed further to decision of possible Seventh Amendment questions.

In the alternative, this Court could dismiss the petition for certiorari as having been improvidently granted, as it has done on rare occasions when an important question that at first appeared ripe for adjudication later turned out to be premature. *McCarthy* v. *Bruner*, 323 U.S. 673 (1944); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 (1923). *Cf.* also *United States* v. *Shannon*, 342 U.S. 288, 294-96 (1952) (opinion of Justice Frankfurter).

Respondent respectfully urges the Court to pursue one or the other of these alternative courses in the case at bar.

II. ASSUMING ARGUENDO THAT PETITIONER'S CLAIM TO A JURY TRIAL RIGHT UNDER THE SEVENTH AMENDMENT NEED BE CONSIDERED, THE SEVENTH AMENDMENT AFFORDED HIM NO SUCH RIGHT TO A JURY TRIAL BELOW BECAUSE HIS CLAIM IN THE DISTRICT COURT IS PROPERLY CHARACTERIZED AS "EQUITABLE" RATHER THAN "LEGAL."

In assessing a litigant's claim to a right of jury trial under the Seventh Amendment, certain fundamentals have long been established. The most basic is that the Amendment preserves intact just such right to a jury as obtained in the English common law of 1791, the date of the amendment's ratification. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved [by the *Seventh Amendment*] *is the right which existed under* the English common law when the Amendment was adopted.") This constitutional protection extends only to such claims as were then deemed "legal" rather than "equitable" by the common law. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *Walker v. New Mexico & Southern Pac. R. Co.*, 165 U.S. 593 (1897); *Parsons v. Bedford*, 3 Pet. 433 (1830). Any given issue of fact may be either "legal" or "equitable" when viewed in the abstract. For the purpose of deciding whether a litigant enjoys a constitutional right to a jury, it is the nature of the claim asserted, rather than any particular issue of fact, which operates as a touchstone. When confronted with a claim, it is thus incumbent upon any federal court to appraise the claimant's pleadings and make a classification of his action as "legal" or "equitable."

In diversity cases, a threshold question would appear to be whether it is federal or state law that makes the characterization of "equitable" or "legal" for purposes of deciding whether a claimant has a Seventh

Amendment right to a jury trial. So far as Respondent is aware, this is a matter never yet squarely laid to rest by this Court. In Respondent's view, the better reasoned decisions by federal courts of appeal support the notion that federal rather than state law should control this characterization. *E.g., Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F. 2d 62, 64-65 (3d Cir. 1943); *Diederich* v. *American News Co.*, 128 F. 2d 144 (10th Cir. 1942); *Bowie* v. *Sorrell*, 209 F. 2d 49 (4th Cir. 1953) ("We conclude that the right to jury or court trial in the federal courts has been and should continue to be solely one of federal practice."); *Hollingsworth* v. *Gen'l Petroleum Corp.*, 26 F. Supp. 917 (D. Ore. 1939). Also on the side of this view is the very important fact that it alone would insure uniformity in the application of a Constitutional right, a consideration of great importance.

However this point may be resolved, it must be borne in mind that even if Oklahoma law were held applicable, it would not have secured to petitioner a right of jury trial. In *Southard* v. *MacDonald*, *supra*, the Oklahoma Supreme Court stated in its syllabus (which, by state practice, must state the law of the case:

> "Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter."

After this Court had earlier remanded the present case to the 10th Circuit for reconsideration in light of *Southard*, the 10th Circuit held that the present case was analogous to *Southard*. They were akin, it held,

because the essence of each, by local characterization, was an action to set aside a contract preparatory to seeking other relief. This action is "equitable" under Oklahoma law. Realizing that this Court normally accepts as controlling the interpretation by a Court of Appeals of the state law within its circuit, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949), any question of state law may now be laid aside. What follows, accordingly is Respondent's analysis of the Petitioner's action below, on the assumption that federal law makes the characterization for purposes of determining whether there was a constitutional right to a jury trial.

A. Petitioner's Original Complaint Below Was Equitable in Character

Viewed by itself, Simler's original complaint is exceedingly difficult to compress into any particular form of action existing in 1791. His prayer was that ". . . this Court adjudge whether or not this plaintiff is indebted to the defendant in any sum . . . and if so, to what extent or what amount. . . ." Essentially, he sued to determine the extent of his liability under an admittedly lawful contract of employment with an attorney. Such an action, Respondent submits, could not have been brought *at all* in the common law of 1791. This is so for at least two reasons. One is that no action lay at that date by which a barrister could enforce promises made to him in an attorney-client contract of employment. *Moor* v. *Row*, 1 Ch. Rep. 38; 6 Holdsworth, *A History of English Law* 440 (1937). Enforcement of a client's promises to a barrister not being of judicial cognizance, such promises were thus, strictly speaking, no more than moral obligations. Had a client asked an English common law court to deter-

mine his legal obligations under such a contract, therefore, he would have been seeking a judicial nonesuch. The second, and still more compelling reason is that the common law made no allowance for the kind of declaratory relief envisaged by the Declaratory Judgment Act of 1934, 28 U.S.C. §§ 2201, 2202. Simler's complaint, indeed, is the kind that could never have brought in any fashion, but for the Declaratory Judgment Act.

Since Simler's action could not have been brought in 1791, it follows that there was no jury right on that date for such an action. If the action enjoyed no common law right of jury trial then it accordingly enjoys no Constitutionally protected right of jury trial today. The mere fact that the Declaratory Judgment Act now provides federal courts with the jurisdiction to entertain cases of this type does not enlarge the historically derived Constitutional right of jury trial.

Of course, it frequently happens that litigants are empowered by statute to file actions which they could not have filed at common law. In such cases, a notable commentator has observed, ". . . the right of action should be analogized to its historical counterpart, at law or equity, for the purpose of determining whether there is a right of jury trial." 5 Moore, Fed. Practice & Procedure 125. The theory of this proposition, as ably expounded in *United States v. Jepson*, 90 F. Supp. 983, 986 (D. NJ 1950), is that ". . . when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute." Respondent does not necessarily cavil with this observation, nor does the analysis of the instant case do any violence to it.

This notion of "analogizing" for the sake of deciding Seventh Amendment claims has been followed typically, if not exclusively, in cases where a statute created a new substantive right but the enforcement machinery for the right fitted into an older mold, or "form of action." See, *e.g.*, *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (W.D. La. 1941); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 280 (W.D. Pa. 1947); *cf.* also *Hepner* v. *United States*, 213 U.S. 103 (1909).

The "analogizing" doctrine, as here described, has not in terms received this Court's official approval. Whether Professor Moore's conception of it would conflict with the theory applied by Respondent to Simler's claims below is perhaps not perfectly clear. Respondent feels that there is no conflict, but assuming one, that precedents of this Court uphold Respondent's analysis of the actions now under review.

In a word, Respondent's position is that Simler's action, as filed in the district court, had *no* counterpart at common law, and hence no right of jury trial. It will not do, of course, to say the action was just an action on a contract, hence analogous to assumpsit or some other common law form of action on the "law" side. Such a too facile analysis overlooks the crucial fact that the type of action filed by Simler was affirmatively barred at common law. This is true both because, as noted above, an attempt to obtain accounting of one's liability to a barrister was not of judicial cognizance and because the common law in no case would afford declaratory relief. Analogies are altogether gratuitous in this case because the essential thrust of Simler's claim—what he actually sought to do—had no counterpart in the common law and was affirmatively barred.

In this sense, the present claim is akin to an effort to sue the sovereign. This was, of course, impossible at common law, but by statutory cession of jurisdiction it may now be accomplished in federal courts. But the fact that such suits now lie, by statutory grace, certainly does not create a Seventh Amendment right to jury trial in such cases. In *Galloway* v. *United States*, 319 U.S. 372 (1943), this Court so held, in reviewing a suit against the United States on a governmental war risk insurance policy. The Court noted there "... that the [Seventh] Amendment has no application of its own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign." 319 U.S. 388.

The principle of this decision was hardly novel. Much earlier the Court had said substantially the same thing in *Guthrie Nat'l Bank* v. *City of Guthrie*, 173 U.S. 528 (1899). There a territorial legislature had enacted a statute creating a special commission to pass on monetary claims against the city of Guthrie. In reversing a territorial court's holding that the statute was void, the Supreme Court held, *inter alia*, that the absence of jury trial procedures did not vitiate the legislation. It stated:

> "There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else the Seventh Amendment . . . is violated. . . ."
>
> "This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law. . . ." 173 U.S. 528, 537.

So also in the well-known case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301

U.S. 1 (1937). This Court held that the N.L.R.B. could properly render an order for payment of back wages even though administrative machinery, rather than a jury, was employed by it to make findings of fact. This decision is particularly relevant because the Court there squarely rejected the argument urged upon it that the award of back wages, being an order for monetary payment, should be analogized to a judgment for damages at common law. The analogy was inapposite, said the Court, because "[t]he proceeding is one unknown to the common law. It is a statutory proceeding. . . . The contention under the Seventh Amendment is without merit." 301 U.S. 1, 49.

The words just quoted apply with equal accuracy to the proceeding now under consideration. The complaint below was most emphatically not known to the common law. It is a statutory proceeding in the sense that it would not lie even today but that the Declaratory Judgment Act. Yet the Declaratory Judgment Act itself cannot somehow trigger into being a metaphysical "jury trial right" which could, as a matter of raw historical fact, never have been asserted in 1791.

Respondent's reasoning under this head can be capsuled in this fashion. If the kind of action brought below was barred by the common law, the action historically never had any right to jury trial at common law. By the "action" Respondent means, specifically, a request by a client for an adjudication of the amount of his obligations to his attorney under a lawful employment contract. Such a request would have been dismissed as an anomaly at common law because the courts did not issue advisory opinions and could not logically have been expected to adjudicate purely moral obligations. Such obligations are now legally enforce-

able rather than "moral," through the force of internal Oklahoma law. The federal district courts now have jurisdiction to entertain suits for declaratory relief, because of the Declaratory Judgment Act. For these reasons an "action" now lies that at common law did not. But has a Constitutional right to jury trial somehow been created in this process? Certainly not. This situation is not like that, say, of an employee's suit against his employer for unpaid wages. The legal obligation to pay these minimum wages was created by statute, to be sure, and such a duty did not exist at common law. But the action by which the employee seeks to enforce this new obligation sounds in debt or assumpsit. Similar duties at common law were enforced in exactly the same way, with a judgment being rendered for money damages. The particular right or duty is new; the mode of enforcement is not. In such instances the "analogies" above may be perfectly proper, though Respondent wishes to make no commitment either way. But the instant "action" was one involving neither a right *nor a* mode of enforcement accepted by the common law. It is precisely like the "action" against the soverign which at common law was a purely mythical one, both in the sense of a right and the enforcement machinery for that right. If no constitutional right attaches to suits brought against the sovereign today, none attaches to suits such as Simler brought below. Hence, a search for possible analogies to the instant "action" is not merely bootless but a positive mistake. To compound a jury trial "right" out of the instant circumstances is to create a Constitutional right out of whole cloth, and can only be accomplished by the alchemy of the bootstrap.

Still, if analogies must be attempted, Respondent points to the fact that Simler's complaint bears none

of the incidents of any common law action on the law side but only to those sounding in equity. His was not a damages suit, as would have been an action in debt or contract. He did not even ask for a determination of someone else's liability to him. He merely sought an adjudication of his own *amount* of liability to another, the *fact* of liability being freely conceded. If Respondent were compelled to suggest a suitable analogy, he would be hard pressed to do so. On balance, however, the common law form of action most nearly analogous to Simler's would appear to be that of account. This was, of course, an equitable action at common law and is so considered by federal courts for purposes of determining Seventh Amendment rights. *Johnson* v. *Gardner*, 179 F. 2d 114 (9th Cir. 1949); *Beregrici* v. *Chaplin*, 7 F.R.D. 61 (S.D. N.Y. 1946); *Williams* v. *Collier*, 32 F. Supp. 321 (E.D. Pa 1940). The major distinction between Simler's original claim and the common law conception of an accounting action is that Simler sought, so to speak, an accounting of *his* obligations to another, rather than the reverse.

The net of the argument so far, then, is that Simler's original claim, viewed unto itself, was an action with no counterpart at common law. The common law recognized neither the *right* nor the *mode* of enforcement here involved. Hence, with nothing to analogize to, no analogies need be sought to early forms of action. But if analogies are necessary, there is still none reasonably suited to Simler's claim save that of an accounting, which was equitable in character and enjoyed no jury trial right. Thus, it seems fair to say that Simler was entitled to no Constitutionally-protected jury trial below on the strength of his original claim alone.

B. Petitioner's Claim Below, Considering His Amended Pleadings in Light of Respondent's Counterclaim, Was Also Equitable in Character

After the filing of Simler's complaint and amended complaint, Conner filed an answer and counterclaim. (R. 6 *et seq.*) The counterclaim set up the September 25 instrument (R. 12) and asked for judgment thereon. Specifically, Conner sought judgment in his favor for an undivided one-half interest in the Caddo County farm which, by his lights, constituted the "50% of the amount recovered," as provided in the September paper. (R. 19) In reply to this counterclaim Simler filed a rather lengthy pleading. (R. 41-69)

Any hope Simler may have had to a jury trial right naturally turns on the nature of the claim he asserted, as the actual issues emerge from the proceedings below. *Damsky*, v. *Zavatt*, 289 F.2d 46, (2d Cir. (1961); *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corp.*, 124 F.2d 563, 566 (2d Cir. 1942); *Hargrove* v. *American Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942). What then has been added to Simler's case?

As noted in the introduction *supra* three potential issues were generated by these responsive pleadings. For the reasons developed at pp. 6-7 herein the only one that can be of real concern here is the allegation of a fraudulent inducement of the September instrument. Assuming *arguendo* that this was not a sham "issue," it still readily appears that Simler's cause fares no better after his response to the counterclaim than before.

To allege that the September instrument was fraudulently induced was simply to assert that what, to all intents and purposes was an unambiguous contract, should not really be considered as such because there

was fraud in the execution thereof. This is the classic instance of an action to reform or set aside a contract or written instrument.[2] At English common law and under most state rules this is a typical, long-established equitable form of action carrying with it no right to a jury trial. 9 *Am. Jur.* §§ 4, 6; 5 Moore, Fed. Practice & Procedure 183. It is equally well established that "federal" law treats actions to set aside or reform contracts as "equitable" for the purpose of deciding a litigant's right to jury trial. *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203 (1937); *Liberty Mutual Ins. Co.* v. *Gerald*, 170 F.2d 917 (5th Cir. 1948) (action to set aside or cancel written compromise settlement, preparatory to enforcement of another claim); *City of Morgantown* v. *Royal Ins. Co.*, 169 F.2d 713, 714

[2] The same analysis, it might be noted, applies to the potential issue as to the "reasonableness" of the 50 percent award provided in the September instrument. Such an "issue" could not possibly arise until the September instrument had been set aside, otherwise the fifty per cent sum would control. It also bears mentioning that Respondent's analysis of both the "reasonableness" and "fraudulent inducement" issues, or potential issues, as constituting an action to set aside or reform a written instrument, hence equitable in nature and affording no jury trial right, does not conflict with the decision of this Court in *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). This Court there held that it may in some cases be an abuse of discretion for a trial judge to order issues tried to the court before trying others to a jury, where certain essential questions are common to both. It does not touch the instant cases for two very clear reasons. The first is that there were no common questions as between a possible issue of "fraudulent inducement of the signature" and the "reasonableness" of the fee specified in the instrument. The second is that, even if there had been, Petitioner's "right" to a jury trial of the "reasonableness" matter—actually the be-all and end-all of his efforts at the trial—could never have come into existence *until* the court-triable issue of whether the writing was to be set aside as fraudulently induced had already been decided. The *Beacon* doctrine does not reach such purely contingent rights. See *Damsky* v. *Zavatt*, 289 F. 2d (2d Cir. 1961) at 56.

(4th Cir. 1948); *Garland* v. *Garland*, 165 F.2d 131 (10th Cir. 1947); *Edward B. Marks Music Corp.* v. *Wonnell*, 4 F.R.D. 146 (S.D. N.Y. 1944); 5 Moore, Federal Practice & Procedure 184.

In short, when viewed in light of his response to Conner's counterclaim, Simler's claim became one to cancel or set aside a written instrument or contract. The 10th Circuit in its second decision characterized the action in precisely this fashion. So, it appears, should this Court. So characterized, the action most emphatically did not entitle Simler to a jury trial.[3]

---

[3] As a final note, in no way intended to be recriminatory, it bears mentioning that Petitioner's brief nowhere sets out any theory or analysis demonstrating why his claims below should fall within the rubric of "legal" rather than "equitable" actions. The burden of the brief seems to be simply to assert that the Seventh Amendment applies to cases brought before federal courts sitting in diversity. For all that appears, Petitioner stands on the idea that if it applies it automatically grants a right of jury trial, on demand, in all types of cases filed therein—a proposition that can only be described as a legal barbarism.

Respondent, of course, has never elected to argue that the Seventh Amendment is somehow inapplicable to federal courts when exercising their diversity jurisdiction. This Court's disposition on that point was adumbrated long ago by Justice Holmes, *Davis* v. *Wechsler*, 263 U.S. 23, 24 (1923). More recent decisions have indicated, either by implication or by strong dicta, that the Amendment does indeed apply. See *Byrd* v. *Blue Ridge*, *supra*; *Lyon* v. *Mutual Benefit Health and Accident Ass'n*, 305 U.S. 484, 489-90 (1939) and, most recently, *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 7 L.ed. 2d 798, 804 (1962).

Granted its applicability, the Seventh Amendment still assured Petitioner of no jury trial right in this case because his claim cannot fairly be defined as "legal" in character, applying the

CONCLUSION

For the foregoing reasons Respondent respectfully prays that the action by the Court of Appeals be affirmed; or, alternatively, that the petition for certiorari now be dismissed as having been improvidently granted.

Respectfully submitted.

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traditional standards by which the scope of Seventh Amendment protection is measured. Furthermore, even if Petitioner had made "legal" claims, the Seventh Amendment would have assured him of no right to a jury trial below because there were no material issues of fact and issuance of summary judgment was entirely proper.

APPENDIX

As observed in the brief, the District Court conducted three separate hearings before granting Respondent's motion for summary judgment. In addition, the trial judge had before him the depositions of both parties and Mr. Arnold Britton, the third person present when the September 25 instrument was executed. Pertinent excerpts are as follows:

1. From Mr. Conner's:

> A. I can't answer your question except that that is our contingent fee contract. All this letter of September 25th, 1952, does to the letter of July 18, 1952, is for him and I to determine what the word reasonable fee meant, and it inured just as much to his benefit as it did to mine. Now, another thing, another thing, Mr. Ogden, that might have brought this thing about, I had discussed this matter as I recall, with Mr. Grigsby, about employing him on a contingent fee contract in this case, and he said, 'How have you been employed?' And I showed him my July 18th employment, and I think that either he or Mr. Britton was talking about that we had better find out from Mr. Simler or agree with Mr. Simler what a reasonable fee would be, and that may be another thing that brought this thing about. (Original R. 711 et seq.)

2. From Mr. Simler's:

> The Witness: I signed it for one reason because they talked in such a manner that it would just be impossible for them to continue the case unless they got a stronger, more assured contract than they had before, that it was a reasonable contract and they didn't think that that was, in other words, sufficient for all the litigation they were going to have and at the same time they assured me that they had the will case by hiring Mr. Daugherty, that they had the will case finally froze up. Now, I don't say that they hired Mr. Daugherty at this time, but they did right shortly after that and he informed me that he was going to hire

some other lawyers, but he didn't tell me who they were, but he said he had a good will case man. (Original R. 860)

3. From Mr. Britton's:

Q. All right, sir. Now when you called Mr. Simler down on the 25th of September, 1952, was Mr. Grigsby there?

A. I don't remember.

Q. Well, when this letter was signed, you don't know who was there then?

A. Well, I am sure that I was there, and I am sure that Mr. Conner was there, but I don't remember for sure whether or not Mr. Grigsby was there.

Q. Would you tell the court and jury why you said to Mr. Conner and Mr. Conner to you Would you tell the court and jury what you said to Mr. Conner and Mr. Conner to you, and either one of you to Mr. Simler about this letter here dated the 25th of September, 1952, signed by Mr. Simler?

A. What was said to Mr. Simler?

Q. Yes.

A. Well, I think I have answered it once, but I will try to do it again.

Q. Well, I do not recall it, if you did.

A. That we just felt like because of the mass litigation that was going on and for the protection of every one concerned, both Mr. Simler and to Mr. Grigsby, Mr. Conner and myself, that the amount of the fee ought to be set out with particularity so that we would know where we were and that that was more or less a standard amount and we thought that it was a fair and reasonable fee, and I can't say to you that Mr. Simler was gleeful or enthusiastic about it, but the fact remains that he did sign it (Original R. 935-1)

Respondent also respectfully invites this Court's attention to the extended colloquy between the trial Judge and counsel for Petitioner below, reported in the printed record herein at pages 101-105. This reveals, perhaps better than anywhere else, both the fair mindedness of the trial court and the absence of any genuine issues of fact.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 59

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER,
Respondent.

REPLY BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER,
Respondent.

REPLY BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion to be reviewed herein is styled: A. J. Simler, Appellant v. Leslie L. Conner, Appellee, 295 F.2d 534, wherein the Circuit Court denied the petitioner a jury trial. Prior to the rendition of this opinion by the United States Court of Appeals, Tenth Circuit, the Court of Appeals, Tenth Circuit, in the same case reversed and remanded the cause to the United States District Court for the Western District with instructions to grant a jury trial in conformity with the views expressed in the opinion. This case is found in 282 Federal Reporter 2nd Series beginning on page 382.

Prior to the last mentioned opinion, and on January 7, 1960, in an action styled A. J. Simler, Petitioner v.

Honorable Stephen S. Chandler, U. S. District Judge for the Western District of Oklahoma, Respondent, on Petition for Writ of Mandamus, the United States Court of Appeals, Tenth Circuit, entered its Order and Judgment, paragraph 1 of said Order being as follows:

> "That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, v. Leslie L. Conner, defendant, Civil No. 8008, and submit to a jury for determination all disputed issues of fact arising in such action."

The United States District Judge, the late W. R. Wallace, before whom the case was originally pending, granted a jury trial as reflected by the record (p. 71).

The judgment of the Court of Appeals involved herein was entered on October 12, 1961 (R., pp. 115-117, incl.), rehearing denied November 18, 1961, Petition for Certiorari filed December 29, 1961, *certiorari* granted January 15, 1962 (82 S.Ct. 440).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESIONS PRESENTED

The only question to be presented in this Reply Brief will only go to the question of whether or not the Petitioner is entitled to a jury trial under Federal procedure. In order for the Court to have before it a full and complete state-

ment of the contention of the Petitioner, we deem it necessary to make a brief statement concerning the state of the pleadings and the facts as reflected by the Record herein. The Court will probably recall from the argument that factually the Respondent had been the attorney for the Petitioner, and the parties could not agree upon what a reasonable fee for compensation should be, and the Petitioner filed his Complaint on April 24, 1958, in the United States District Court for the Western District of Oklahoma seeking a declaratory judgment to determine what, if any, fee he owed to the Respondent as attorney's fees and set forth the amount he had paid out prior thereto.

The Respondent, defendant in the court below, filed an Answer and Counterclaim. In the Answer and Counterclaim, which appears beginning on page 6 of the Record, and continuing through page 23, in which he contends that the original agreement or employment contract dated July 18, 1952, which was a letter of employment, signed by Mr. Simler, was modified by a letter dated September 25, 1952, and which letters are in words and figures as follows, to-wit:

"July 18, 1952

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: Birdine Fletcher Estate
County Court Oklahoma County, Oklahoma.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County

Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court, if the matter is successful either by trial or judgment or compromise.

If the matter is not won, compromised or settled, you are not to charge us a fee.

Yours truly,
/s/ A. J. SIMLER
A. J. Simler, for
himself and his children."

"Oklahoma City Oklahoma
October 14, 1952

"Conner, Hilpirt and Britton
Attorneys and Counselors at Law
Hightower Building
Oklahoma City, Oklahoma

Gentlemen:—

This is your authority and direction to file an action in the United States District Court for the Western

District of Oklahoma, brought by me as the Plaintiff against W. H. Wilson as Executor of the Estate of Birdine Fletcher, and Sisters of St. Francis, a foreign Corporation, in which action we are to sue to void the Will insofar as the Real Estate in Caddo County, Oklahoma, is concerned, and for such other matters as the Court may determine in Declaratory judgment.

Yours very truly,
/s/ A. J. Simler.
A. J. Simler"

These letters are on pages 23, 24 and 25, and also on page 23 is the letter of October 14, 1952, authorizing a suit in the Federal Court against the executor of the estate of Birdine Fletcher, deceased, and against the Sisters of St. Francis, a foreign Corporation, which letters are self-explanatory.

We deem it necessary to first call to the Court's attention the position and contention of the Petitioner with reference to the validity of the second letter dated September 25, 1952, and for brevity's sake and convenience, we will hereafter refer to the first letter as the letter of July 18th, and the second letter as the letter of September 25th, and the third letter as the letter of October 14th.

The contract of employment, as we view it, must be governed by the laws of the State of Oklahoma, that is; the construction of the contract. It will be noted that the letter of September 25th was prepared by Mr. Conner and signed by Mr. Simler while the relationship of attorney and client existed and which had existed since the 18th of July.

The Supreme Court of Oklahoma passed squarely on a situation of this kind in the case of *Hauenstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552, it being a lawsuit between an attorney and client and involving a contract made between the attorney and client after such relationship existed, and the Supreme Court of Oklahoma used the following language:

> "It is a well established rule of law that contracts between attorney and client to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, AND EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE." (Emphasis supplied.)

We therefore earnestly urge upon the Court that regardless of the second letter or its provisions or contents the Respondent could not receive more than or recover more than reasonable compensation for his services regardless of the contract price. We also call to the Court's attention the fact that the rule of law announced above by the Supreme Court is the general law in all states.

In the case of *A. C. Rupp* v. *Cortland N. Cool*, Supreme Court of Colorado, 362 P.2d 396, involved a suit between an attorney and client, and that Court said:

> "Once the confidential relationship of attorney and client exists, the law governing contracts entered into between them is very different. The test applied to such contracts when the attorney seeks to enforce the

same is well stated in 7 C.J.S. Attorney and Client Sec. 204(2):

> "Where after the relationship has been established, an attorney and client enter into an agreement in reference to the attorney's compensation, * * * the burden is on him to prove that the agreement was fairly and openly made, was supported by an adequate consideration, and that he gave the client full knowledge of the facts and of his legal rights, when he entered into the agreement, and that the services to be performed were reasonably worth the amount stated in the agreement. * * *."

The legislature of California passed an act whereby it gave the trial judge the right to determine attorneys fees without a jury where the attorney was discharged and the matter was presented to the appellate court in Los Angeles, and is styled *Cassel* v. *Gregori, et al.*, 70 P.2d beginning on page 721, and that Court held that the legislature was not authorized to pass such an act and deprive one of the right to a trial by a jury and held the act unconstitutional, and the Court stated in the last paragraph as follows:

> "* * * This does not mean, however, that the Legislature may at will create new forms of special procedure, parcel out among them the subject-matter of the ordinary actions at law heretofore triable by jury, and thereby whittle away the right to a jury trial. * * *"

The reply of the Petitioner to the Answer and Cross-Complaint of the Respondent appears beginning on page 41 of Record, concluding on page 49, and the Amended Reply to Defendant's Counter-Claim beginning on page 70

and continuing through page 80. In such Reply and Amended Reply, the Petitioner alleges that the September 25th letter was void for the following reasons:

First, there was no consideration for the execution of said letter by reason of the fact that the Respondent was already bound to represent the Petitioner to his best knowledge, skill and understanding and consequently the signing of said letter by the said Petitioner did not constitute a contract because it lacked consideration and was therefore void

Second, the Reply and Amended Reply further alleged that the said letter lacked mutuality; that is; that it only expressed the will of Mr. Conner, the Respondent, and that the Petitioner was induced to sign said letter by fraud, actual and constructive, and by misrepresentation and by undue influence and for such reason said letter could not be enforced and should not be enforced against the said Petitioner.

This, then, brings us to the point as to whether or not under such allegations where a jury has been properly demanded for such matter a question to be submitted to the jury or to the Court. In presenting the matter, we wish first to call the Court's attention to the fact that the Respondent is relying upon such letter of September 25th, and is attempting to enforce it and the petitioner is merely resisting the enforcement of said letter on account of the above reasons. Therefore, we have as a defense to the enforcement of said letter fraud, actual and constructive, and lack of consideration, lack of mutuality, and undue influence.

We think it well to bear in mind in considering the pleadings in this case and the letter of September 25th, that such letter under the law of Oklahoma and under the law of most states, is presumptively fraudulent and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable and even then he is not entitled to recover more than reasonable compensation for his services regardless of the contract price. Therefore, when it appears in the pleadings in any case that the contract between the attorney and client was made after such relationship existed; the burden then is upon the attorney and not on the client and the contract is presumed to be fraudulent and the Colorado Court said that it is likewise presumed to be without consideration. *Rupp v. Cool, supra.*

The question then is whether the defense of fraud to a Cross-Complaint seeking enforcement of a contract should be submitted to the jury, and in this connection we call the Court's attention to the following:

In 50 C.J.S. 778, Article 74, the following statement is made:

> "Where there is a dispute over the terms of an agreement as to the fee to be paid (Merritt v. Cuthbert Bank, 85 S.E. 104, 143 Ga. 394, 35 C.J. p 188 note 36), and also where it is provided by statute that in an action for damages plaintiff if successful may recover a reasonable attorney's fee, (Briggs v. St. Louis & S. F. R. Co., 20 S.W. 32, 111 Mo. 168, 35 C.J. p 188 note 37) the amount of such fee must be determined by a jury, and the attorney does not lose the right to a jury trial because he is an officer of the court. (In re Murphy, 101 A. 935, 258 Pa. 38, In re Kennedy, 14 A. 397, 120 Pa. 497, 6 Am.S.R. 724)."

In the case of *Luther Robinson Maddox v. Fidelity Investment & Title Co., Inc.*, No. 8461, United States Court of Appeals, Fourth Circuit, 300 F.2d 1, the Court used this language in the body of the opinion:

> "These counts sought damages for breach of contract. The defense denied the contracts were fair and reasonable under the circumstances. Testimony took five trial days. The Court submitted the case to the jury under a charge that was not excepted to and which was completely fair to plaintiff. The trial judge properly instructed the jury that an attorney's agreement as to fees must be fair and reasonable, in view of the confidential relationship which exists between attorney and client. The court further instructed the jury as to the factors to be considered in determining whether the agreement was fair and reasonable. The jurors were also instructed that if they found the agreements were not fair and reasonable, they should award the plaintiff such amount over and above what he had already been paid that seemed to them to be fair and reasonable under all the evidence The jury had the benefit of Maddox's testimony in voluminous detail as to the work he had performed and found that he had been adequately compensated by sums he had received prior to his discharge. This lays the matter to rest, once and for all. Where, as here, there is an evidentiary basis for the jury's verdict, the appellate court cannot be asked to substitute its judgment for that of the jury. Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946)."

COMMENT: While the Court submitted the case to a jury under proper instructions with reference to the second and/or third contracts entered into between the attorney and client and apparently there was no question raised as

to the right of jury trial under such circumstances, but nevertheless, it was a case between attorney and client under very similar circumstances to the case at bar.

For emphasis sake, we call to the Court's attention that in this case, the Respondent is seeking to enforce the letter of September 25th and the Petitioner is defending on the ground of no consideration, fraud and a breach of a fiduciary relationship and if any of the defenses interposed in the letter are true, the Respondent would not be entitled to prevail on the letter, but nevertheless would be entitled to a reasonable attorney's fee in view of all the circumstances in the case to be determined by the jury.

The late W. R. Wallace, United States District Judge, when the question was raised as to a jury trial, used the following language (R. 71):

> "The Court will permit the introduction of both letters in question as representing the contract between Mr. Simler and Mr. Conner, and the issues to be resolved by the jury are whether this contingent fee contract was made in good faith, without fraud or overreaching by Mr. Conner and whether the compensation bargained for was just and fair. If the jury determines that the two letters in question are enforceable then the terms therein will control. However, if for any reason, the jury strikes down the second letter as having been gained through fraud or overreaching then the jury will have to determine just what constitutes a reasonable fee under the circumstances.
>
> "Very truly yours,
>
> "/s/ W. R. Wallace."

We feel that Judge Wallace was entirely correct in his holding that the Petitioner was entitled to a jury trial.

In the case of *Minnesota Mutual Life Insurance Company* v. *Brodish*, 200 F. Supp. 777 (1962), the Court said:

"1. Where common issue is involved both at law and in equitable proceeding, constitutional right of trial by jury must prevail. U.S.C.A. Const. Amend. 7.

"2. Declaratory judgment act preserves right to jury trial. 28 U.S.C.A. §§ 2201, 2202; U.S.C.A. Const. Amend. 7.

"3. Question of fraudulent misrepresentation was decisive of issue both in insurer's action for judgment declaring life policies void because of fraudulent misrepresentations and seeking rescission and cancellation of policies and in beneficiary's counterclaim for face amount of policies, and beneficiary could not be deprived of constitutional right to jury trial on such issue by suspending action on counterclaim and trying complaint for declaratory judgment without jury. 28 U.S.C.A., Sections 2201, 2202; U.S.C.A. Const. Amend. 7.

"(2, 3) the Beacon case was a suit neither in equity nor at law, but a statutory proceeding under the Declaratory Judgments Act (28 U.S.C. Sections 2201, 2202), a remedy provided by Congress in which trial by jury is preserved (Beacon Theatres v. Westover, supra; at p. 504, 79 S.Ct. 984). But the plaintiff there sought the equitable aid of injunction, just as here in a declaratory judgment suit plaintiff seeks the equitable remedy of rescission and cancellation. The issue of fraudulent misrepresentation is decisive of the issue in both the plaintiff's suit and the counterclaim. For if the insured was guilty of fraudulent misrepresentation the beneficiary cannot recover. This issue it is

the defendant's right under the Seventh Amendment to have decided by a jury. Even where this a purely equitable proceeding, and not a statutory declaratory judgment action, the Beacon doctrine tells us that the longest footed chancellor may not cross the line established by the Seventh Amendment.

"The motion to suspend action on the counterclaim therefore must be denied. The case should remain on the civil jury trial list and not on the civil non-jury trial list. When it is reached for trial both the complaint and counterclaim will be tried together before a jury.

"We accordingly enter the following

ORDER

"AND NOW, January 10, 1962, the motion to suspend action on the counterclaim is denied. Both the complaint and counterclaim shall be tried by jury pursuant to defendant's demand for jury trial."

In *Canning* v. *Star Publishing Company*, 138 F. Supp. 843, United States District Judge Leahy, Chief Judge, used this language:

"(3) Nothwithstanding these careful distinctions, I think the better view, and one more widely accepted by the courts, is to try the issue of fraud, whether in the execution or inducement, in an instrument under seal or not, before a jury where the issues are otherwise legal. This Circuit has, to some extent, taken that position in Ettelson v. Metropolitan Life Insurance Company, 3 Cir., 137 F.2d 62. There, defendant sought in his counterclaim, rescission for fraud in the inducement of insurance policies sued upon by plaintiffs. Demand for trial by jury was filed by plaintiffs, along with a motion to dismiss the counterclaim. The district court denied the motion and ordered preliminary con-

sideration of the counterclaim without a jury. D.C.N.J., 42 F. Supp. 488. The Court of Appeals, in reversing the order, recognized, although fraud is an issue equitable in origin, it has long been treated in the courts of the common law. Said the Court (per Judge Goodrich), 137 F.2d at page 64: 'The practical result of the determination of the present issue is whether the plaintiffs are to have a jury trial, or whether the defendant may have the fraud issue tried by the judge.' And at pages 65-66 of 137 F.2d 'Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective 'legal' or 'equitable.' The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since." Certiorari was subsequently denied by the Supreme Court in 320 U.S. 777, 64 S.Ct. 92, 88 L.Ed. 467.

"At times, particularly where claims on insurance policies are concerned, a separate trial on the issue of validity of the release has been granted under FR 42(b) to avoid inconvenience or prejudice. In such cases the issue of fraud, whether in the execution or in the inducement, has been argued before a jury.

"In the situation where defendant raises the defense of a release in his answer, and plaintiff replies on the ground of fraud, trial by jury has been conceded along with the other legal issues in the action. But, it is contended in the instant case, where plaintiff affirmatively seeks equitable relief in the complaint, as was done here, the issue should be tried to the court. While there is some authority to sustain this differentiation, it has been refuted by recent decisions."

In the case of *Dickinson* v. *General Accident F. & L. Assur. Corp.*, 147 F.2d 396, the Court said in the syllabus as follows:

"(1) The primary question on the appeal is whether this treatment of the verdicts was error. We think it was. The right to a jury trial of factual issues ordinarily triable to a jury is expressly preserved by the declaratory judgment statute. In the absence of the procedure for declaratory relief it is plain that the issues here litigated could have been developed only in an action at law on the policy. A party may not, merely by reversing the normal procedure, deprive his adversary of the right which would otherwise be his to have his case determined by a jury. Pacific Indemnity Co. v. McDonald, 9 Cir., 167 F.2d 446, 448, 131 A.L.R. 208; Hargrove v. American Cent. Ins. Co., 10 Cir., 125 F.2d 225.

"The issues here tried pertaining to the giving and to the waiver of notice are basically legal. The issue of estoppel in pais tendered in the amended answers, while equitable in origin, has long been one cognizable as of course in the courts of common law. In this case the issue was submitted to the jury under appropriate instructions, and we do not doubt it was the jury's exclusive province to decide it. Kellogg-Mackey-Cameron Co. v. Havre Hotel Co., 9 Cir., 173 F. 249; Smith v. Royal Ins. Co., 9 Cir., 93 F.2d 143, 146; City of Ironton v. Harrison Const. Co., 6 Cir., 212 F. 353; Letta v. Cincinnati Iron & Steel Co., 6 Cir., 285 F. 707; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co., 6 Cir. 170 F. 240; Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L.Ed. 617."

In the case of *Callen v. Pennsylvania R. Co.*, 162 F.2d 832, the Court said:

"* * * There was thus in the trial some evidence of mutual mistake regarding Callen's injuries, an important element in the settlement. That evidence in

order to void the release, had to be clear, unequivocal, and convincing. Chicago & N. W. Ry. Co. v. Wilcox, 8 Cir., 116 F. 913, 914; Restatement of Contracts, Sections 502, 511. Whether the testimony here considered fulfilled those conditions was for the jury to pass upon under the guidance of the Court's instructions."

In the case of *Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F.2d 62, the Court said:

"(4) Having concluded that the rule of Erie R. Co. v. Tompkins does not affect the procedure in the pending case, the final question is whether the defendant is entitled to have its counterclaim tried by the court, as though the judge was sitting in equity, before the present rules, or whether the plaintiffs are entitled to have the issue tried by a jury. Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. We must then inquire whether prior to the adoption of the Federal Rules of Civil Procedure a defense of 'equitable' fraud to an action for the proceeds of a life insurance policy was within the exclusive jurisdiction of equity. If it was, then there is no right to the jury trial demanded and defendant's contention that the matter raised in the counterclaim should be tried by the court must be sustained, not because of Erie R. Co. v. Tompkins, but because that is the federal court law on the subject."

"(5) We turn then to the federal decisions. The general rule pronounced by the Supreme Court is that in insurance cases, in the absence of special circumstances, which are not present here, 'fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available.' American Life Ins. Co. v. Stewart, 1937, 300 U.S. 203, 212, 57 S.Ct. 377, 379, 81 L.Ed. 605, 111 A.L.R. 1268, citing Enelow v. New York Life Ins. Co., 1935, 293 U.S. 379, 385, 55 S.Ct. 310, 79 L.Ed. 440; Adamos v. New York Life Ins. Co., 1935, 293 U.S. 386, 55 S.Ct. 315, 79 L.Ed. 444; Insurance Co. v. Bailey, 1867, 13 Wall. 616, 20 L.Ed. 501; Cable v. United States Life Ins. Co., 1903, 191 U.S. 288, 306, 24 S.Ct. 74, 48 L.Ed. 188.

"(6, 7) In none of these decisions, however, is the distinction between 'legal' and 'equitable fraud' expressly drawn. The defendant has urged that the cases involved 'legal fraud' and the rule laid down applied only in such instances. With this contention we do not agree. We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent misstatement or nondisclosure has been tried by a jury in an action at law on the policy. Three of the decisions to this effect were written by no less an eminent authority on equity jurisprudence than Justice Story. McLanahan v. The Universal Insurance Company, 1825, 1 Pet. 170, 185, 7 L.Ed. 98; Carpenter v. American Ins. Co., C.C.D.R.I., 1839, 5 Fed.Cas. page 105, No. 2,428; Hazard v. New England Marine Ins. Co., C.C.D. Mass., 1832, 11 Fed. Cas. page 937, No. 6, 282, reversed on other grounds, 1834, 8 Pet. 557, 8 L.Ed. 1043, but expressly affirming the point involved here, 8 Pet. at page 583, 8 L.Ed. 1043. See also Carrollton Furniture Mfg. Co. v. Ameri-

can Credit Indemnity Co. of New York, 2 Cir., 1902, 115 F. 77; affirmed on rehearing, 2 Cir., 1903, 124 F. 25, certiorari denied, 1904, 192 U.S. 605, 24 S.Ct. 849, 48 L.Ed. 585.

"Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective 'legal' or 'equitable.' The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since.

"The order of the District Court is reversed and the case remanded for further proceedings in accordance with this opinion."

In *Callen* v. *Pennsylvania R. Co.*, heretofore cited in the Circuit Court opinion, in which *certiorari* was granted, 332 U.S. 625, 68 S.Ct. 296, with reference to withdrawing from the consideration of the jury, and this Court said in the body of the opinion as follows:

"(1) The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said (162 F.2d 832, 834): 'This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries'."

This Court has specifically and directly held that the defense of fraud to a written instrument is triable by a jury. In the case of *Enelow* v. *New York Life Ins. Co.*, 293 U.S., 55 S.Ct. beginning on page 310 and quoting from the body of the opinion as follows:

" * * * Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant 'with knowledge of their falsity and fraudulently' in order to obtain the insurance. The affidavit of defense showed nothing whatever as a further ground for equitable relief, and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law, and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. Phoenix Mut. Life Insurance Co. v. Bailey, 13 Wall. 616, 623, 20 L.Ed. 501; New York Life Insurance Company v. Bangs, 103 U.S. 780, 782, 26 L.Ed. 608; Cable v. United States Life Insurance Co., 191 U.S. 288, 305, 24 S.Ct. 74, 48 L.Ed. 608; American Mills Co. v. American Surety Co., 260 U.S. 360, 363, 43 S.Ct. 149, 67 L.Ed. 306; New York Life Insurance Co v. Marshall (C.C.A.) 23 F2d 225; New York Life Insurance Co. v. Miller, supra. Respondent was in no better position under section 274b (28 USCA section 398).

"(7) Nor is there merit in the contention that the remedy at law is not adequate because petitioner is not the only person interested in the policy and that the premiums paid would be refundable to the decedent's executors. The executors have no interest entitling them to enforce the policy. Petitioner is the sole beneficiary of the policy, and is entitled to recover upon it, if it is valid, and cannot prevail if the defense of fraud is established. Insurance Co. v. Bailey,

supra; Cable v. United States Life Insurance Co., supra."

COMMENT: This was a contract of insurance. The defense was, of course, that it was obtained by fraud. The Court held this to be a jury trial. In the case before the Court, the Respondent filed his Answer and Cross-Complaint and he alleged the execution of the letter of September 25th. The plaintiff in that case, Petitioner here, filed his Reply to the Answer and Cross-Complaint and alleged the letter was procured by fraud, actual and constructive and that it was without consideration and he demanded a jury. Therefore, under the above authority, clearly Petitioner is entitled to a jury in the Federal Court, and if he present fraud in the procurement of said letter or failure of consideration, the jury will nevertheless fix for him a reasonable attorney's fee but not based upon the letter of September 25th.

In the case of *Hargrove* v. *American Cent. Ins. Co.*, 125 F.2d beginning on page 225, the Court said:

> "The basic issue tendered by the pleadings and the proof is the liability of the insuror on the contracts of insurance because of the alleged fraudulent conduct and false swearing of the insured. THE CASE IS BOTTOMED ON FRAUD WHICH, IF PROVED, WOULD VITIATE THE CONTRACT BETWEEN THE PARTIES. Singleton, et al. v. Hartford Fire Ins. Co., 105 Cal.App. 320, 287 P. 529; Orenstein et al. v. Star Ins. Co. of America, 4 Cir., 10 F.2d 754; 33 Corpus Juris, p. 19, § 667." (Emphasis supplied.)
>
> "* * * If the insured had filed suit on the policies, the asserted remedy would have been legal in its nature and either party would have been entitled to a jury on

timely demand as provided by the rules of civil procedure. In this event, the insurors could have asserted the same remedy as a legal or equitable defense to the legal action to recover. Pacific Indemnity Co. v. McDonald, supra.

"(9) The insuror therefore had a plain and adequate remedy at law and the issues tendered were basically legal in their nature, and the case was triable as of right by jury. Englow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440. Cf. American Life Ins. Co. v. Stewart, 300 U.S. 203, 57 S.Ct. 377, 81 L.Ed. 605, 111 A.L.R. 1268."

COMMENT: It will be noted that fraud completely destroys the contract and makes it wholly and completely unenforceable and no rights can be secured under a contract obtained by fraud.

In the case of *Thermoid Rubber Co. v. Bank of Greenwood*, 1 F.2d 891, beginning on page 891, and without burdening the Court with the facts, but there was the allegation of fraud likewise and the Court said in the body of the opinion as follows:

"(1, 2) It is not for us to say where the truth lies. That is a jury question. In his instructions below, the learned judge practically withdrew this issue from the jury, because, as he understood the pleadings, the Thermoid based its right to recover solely upon a letter written in the name of the Bank by Watson to the Thermoid, in answer to an inquiry made by the latter as to the financial responsibility of the Tire Company. It is true that the complaint of the Thermoid, after having alleged the scheme to defraud persons who could be induced to sell tires to the Tire Company, as we have already summarized it, and after having charged

that it was participated in by the Bank, as well as by J. C. Self, did say that a part of it was that the Bank, through Watson, should make and issue to manufacturers and dealers, including the Thermoid, false and fraudulent reports of the financial condition of the Tire Company. The complaint then specifically charged the writing by the Bank of the letter before referred to and hereinafter more fully set out. In our view, under such a pleading, the plaintiff was entitled, as against J. C. Self, to recover if the jury found that the purchase of the tires was brought about by him with the fraudulent intent alleged."

C.J.S., Volume 37, page 448, Article 123, is in part as follows:

"The general rule that questions of fact are to be determined by the jury and questions of law by the court applies in an action for fraud. Thus, if there is proof as to all of the essential elements of fraud, and the evidence is conflicting, the question of fraud is one of fact for the jury, under proper instructions from the court as to what constitutes fraud, or for the court sitting as the trier of the facts * * *.

"* * * If there is a dispute as to the capacity in which the defendant acted in making the representations, the determination of that question is for the jury."

In the case of *Dairy Queen, Inc.* v. *Honorable Harold K. Wood*, 82 S.Ct., beginning on page 894, this Court in the opinion used the following language:

"1. Right to trial by jury is not lost as to legal issues which are characterized as 'incidental' to equitable issues. Fed. Rules Civ. Proc. rules 18(a, b), 38(a), 28 U.S.C.A.

"8. In action to collect a debt for breach of a contract, defendant has right to have jury determine not only whether contract has been breached and extent of damages, if any, but also just what contract was.

"At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts. In Scott v. Neely, decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief * * *.

"The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.'

"In the eighth footnote is found the following:

"'It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it.' Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 5 Cir., 294 F.2d 486, 491".

Quoting further from the opinion:

"Nor is the legal claim here rendered 'purely equitable' by the nature of the defenses interposed by petitioner. Petitioner's primary defense to the charge of breach of contract—that is, that the contract was modified by a subsequent oral agreement—presents a purely legal question having nothing whatever to do either with novation, as the district judge suggested, or reformation, as suggested by the respondents here. Such a defense goes to the question of just what, under the law, the contract between the respondents and petitioner is and, in an action to collect a debt for breach of a contract between these parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is.

"We conclude therefore that the district judge erred in refusing to grant petitioner's demand for a trial by jury on the factual issues related to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims. The Court of Appeals should have corrected the error of the district judge by granting the petition for mandamus. The judgment is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

"Reversed and remanded."

C.J.S., Volume 7, page 964, Article 127(a). Without quoting the authority, the authority holds that any transaction between the attorney and client after such relationship

exists is subject to suspicion and close scrutiny and that such transactions are regarded and discouraged by the policies of the law and will be closely scrutinized by the court and lean against the attorney, and if it appears that the transaction is unfair or that the client has been overreached or unduly influenced, it may be avoided at his election EITHER IN COURTS OF LAW OR IN COURTS OF EQUITY ON THE PRINCIPLES THAT GOVERN THE CONDUCT AND DEALINGS OF TRUSTEES AND FIDUCIARIES GENERALLY. Citing authorities.

The case of *Burnett, et al.* v. *Graves, et al.*, the Court of Appeals, Fifth Circuit, 230 F.2d 49, presented an action by an attorney or attorneys for attorney's fees. While the question was not contested, the case was tried before a jury and the jury returned a verdict in the amount of $85,000.00 for attorney's fees, and said in the body of the opinion as follows:

> "A jury was chosen as the instrument to determine what lawyers did, what they ought to have done, and what the value of those activities was in economic terms to the clients Burnett and Mel Dar. Under instructions submitting the proper standards with a wealth of persuasive, acceptable testimony, they have fixed it. It is reasonable. It is legal. It is approved."

While this case does not determine the question of right to jury trial, one was granted and not questioned by either side.

CONCLUSION

There are many Federal cases holding that a party is entitled to a jury trial on the question of fraud and no consideration, and overreaching by a person who has confidential relationship such as attorney and client. The Oklahoma case construing a situation of this kind has been cited as *Hauenstein* v. *McCallister, supra.* The case of *Rupp.* v. *Cool* by the Supreme Court of Colorado, in addition to the other authorities, set forth the rule.

In addition to these questions, we call to the Court's attention the Oklahoma case cited in our original brief on page 24, *Watson* v. *American Creosote,* to the effect that an agreement to do or the doing of that which he is already bound to do does not constitute sufficient consideration for a new promise. At the most, it is only an agreement that such person was only bound to do and did not constitute a sufficient consideration.

To the same effect is the case of *Johnson* v. *Tanner,* 369 P.2d 307, and the case of *Cueno Press, Inc.* v. *Claybourn Corporation,* 90 F.2d 233. The Court of Appeals of the 7th Circuit used this language:

> "Modification of a contract by subsequent agreement is subject to the rules governing all contracts. Consequently any promise therein contained to do that which one is already obligated to do confers no advantage on the promisee, imposes no detriment on the promisor and is without consideration: 1 Williston on Contracts (1936) § 130; 1 Page on Contracts, § 589; Alaska Packers' Ass'n v. Domenico, 117 F. 99 (C.C.A. 9); Empire State Surety Co. v. Hanson, 184 F. 58

(C.C.A. 8); Frankfurt-Barnett Co. v. William Prym Co., 237 F. 21 (C.C.A. 2); In re American Range & Foundry Co. (D.C.) 14 F.2d 466; Brunswig Grain Co. v. Anchor Grain Co., 10 F.2d 304 (C.C.A. 5); G. S. Johnson Co. v. Nevada Packard Mines Co. (D.C.) 272 F. 291. In other words, consideration is necessary to support a waiver or release of rights whether accomplished by an original instrument or by a modification of an existing contract. Frankfurt-Barnett Co. v. Prym Co., 237 F. 21 (C.C.A. 2); Empire State Surety Co. v. Hanson, 184 F. 58 (C.C.A. 8); Weed v. Spears, 193 N.Y. 289, 86 N.E. 10; Goldsborough v. Gabie, 140 Ill. 269, 29 N.E. 722, 15 L.R.A. 294.

"The controversy between the parties in this connection, then, is as to whether there was any consideration for the modification. A consideration, in the legal sense of the word, is some right, interest, benefit, or advantage conferred upon the promisor, to which he is otherwise not lawfully entitled, or any detriment, prejudice, loss, or disadvantage suffered or undertaken by the promisee other than such as he is at the time of consent lawfully bound to suffer. 13 Corpus Juris 311; 6 Ruling Case Law 654; Tollenetti v. Mellor, 323 Ill. 143, 153 N.E. 744; Kilborn v. Pyne, 279 F. 864 (C.C.A. 5); Goodman Mfg. Co. v. Mammoth Vein Coal Co., 185 Iowa 253, 168 N.W. 912 * * *."

The Petitioner, as we view it, is entitled to a jury trial on the issues of fraud, actual and constructive, no consideration for the letter of the 25th of September, since said letter is presumptively fraudulent and the burden is upon the Respondent to show its fairness, and is entitled to have the jury determine whether or not the Petitioner herein was overreached by his lawyer, and whether or not the signing of said letter of September 25th constituted his free and

mutual agreement to the terms of said letter and these matters are all jury matters, as we view it, and we can make no distinction between a case where a suit is brought on an insurance policy, which is of course a contract, and the defense is that it was procured by fraud and the case at bar, for here we have the Respondent in his Answer and Cross-Complaint setting up the letter of September 25th and the Petitioner by his Reply thereto alleging that the letter was obtained by fraud, without consideration and that he was overreached or persuaded by his attorney to sign his letter and the same lacked mutuality.

The Petitioner most respectfully states to the Court that he at no time attempted to deprive the Respondent of a reasonable attorney's fee as provided in the letter of July 18th, and we feel that a jury will award him a reasonable attorney's fee when the matter is properly presented to the jury. We therefore respectfully ask this Honorable Court to review said cause and grant to the Petitioner a jury trial herein under the Constitution of the United States and the Federal Rules of Civil Procedure.

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January, 1963.

CERTIFICATE

I certify that I mailed a true and correct copy of this Reply Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, to Peyton Ford, 1000 Connecticut Ave., N.W., Washington, D.C., by depositing the same in the United States mail with sufficient postage attached thereto on this 22nd day of January, 1963.

JOHN B. OGDEN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

POST-ARGUMENT BRIEF FOR RESPONDENT

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ment as having been fraudulently induced. It should be noted that Simler's dispute with his attorney did not arise until after the latter had won for his client some $100,000 in cash and a very valuable Oklahoma farm.

There were three distinct "claims." Chronologically, they were:

1. Simler's claim for adjudication of a "reasonable fee" under the July letter-agreement alone.

2. Conner's claim for specific performance of the same "contract," as amplified or liquidated in the fee schedule of the September instrument.

3. Simler's claim for cancellation of the foregoing written instrument of September 25 because his execution of it was alleged to have been fradulently induced.

The federal district court, after ample hearings, granted Conner's motion for summary judgment, thereby enforcing the September 25 instrument and awarding Conner 50% of what he had recovered for Simler, as provided in the fee schedule of that instrument.

I. SUMMARY JUDGMENT WAS PROPER

For the reasons elaborated in his first brief, Respondent contends that summary judgment was altogether fitting and proper because there was no genuine issue of material fact in dispute.[1] The *primary facts*

[1] There was no factual issue over "consideration" below, and Petitioner's suggestions to that effect are quite misleading. No monetary consideration was exchanged for the September instrument, and none was needed. The instrument was, as it purports on its face to be, a mutual liquidation of the previously indeterminate "reasonable fee" provided in the July letter-agreement."

alleged by Simler in support of his plea of fraudulent inducement—such matters as Simler's age, the situs of the execution, Simler's inexperience in litigation and the like—were simply *uncontested* by Conner. As for the more sweeping allegations of ultimate conclusions, *e.g.* "coercion," "fraud," these naturally were inferentially denied, but a dispute over conclusions such as these does not undercut the propriety of summary judgment. The rationale of the trial court's decision evidently began with the implicit premise that such allegations of primary, concrete facts as Simler had made did not, as a matter of law, establish fraud or overreaching by applicable Oklahoma standards of substantive law. On the further question of whether Simler could come forward with legitimate evidence by which to shore up his "conclusions,"—that is to say, whether the whole fraudulent inducement issue, as framed in the pleadings, should be viewed as a sham—the trial court was properly persuaded that it was a sham by the depositions, admissions, affidavits and three exhaustive hearings devoted to the motion.

A trial court's disposition of a summary judgment motion, particularly after the kind of careful treatment afforded it here,[2] should be entitled to considerable weight—at least as much as is usually allowed the court's findings of fact (the "clearly erroneous" doctrine requiring no citation). Although the 10th Circuit has twice reversed this award of summary judgment, it has in neither opinion stated *any reason* for this

[2] In describing the court's treatment of the motion as "careful" or "exhaustive," Respondent does not traffic in hyperbole. The transcript of the three pre-trial conferences following the motion, and devoted mainly to its merits, consumes over 300 pages. See R. at 299-362, 367-512 and 991-1101.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

POST-ARGUMENT BRIEF FOR RESPONDENT

Although already briefed and argued before this Court, a quick recapitulation of this case is probably in order. It began as a declaratory judgment action by Simler, seeking an adjudication of a "reasonable fee" as provided in a July letter-agreement, employing Leslie Conner as Simler's attorney. Conner counterclaimed, setting up a September instrument which purported to liquidate the fees by a definite schedule. The parties agreed that Conner had fully performed, that the ancillary liquidation agreement had been signed by Simler and that it provided in terms a graduated scale of payment pursuant to the contingent-fee contract. The fulcrum of the present dispute was Simler's response to Conner's counterclaim, in which the former sought to set aside the September instru-

ruling. To any fair-minded lawyer who reads the material commencing at pages 109 and 115 of the Record, realizing that it includes everything the 10th Circuit has said on this vital aspect of the instant case, it becomes painfully apparent that the propriety of summary judgment, on the facts and circumstances of this case, has never really been reviewed at all. Summary judgment was simply ruled out *ex cathedra* by the 10th Circuit, in a summary and ineluctable fashion that can scarcely be described as an exercise of reason or judicial review.

For these reasons, Respondent urges again that the trial court's order of summary judgment now be affirmed, without the need for inquiry into the Seventh Amendment issues which this case may raise.

II. THE SEVENTH AMENDMENT WAS NOT VIOLATED

On the other hand, because during oral argument this Court displayed serious interest in these Seventh Amendment issues, Respondent is pleased to avail itself of this additional opportunity for further sharpening and refining its position as to the issues raised by this Amendment.

Since the infancy of our judicial system it has been settled that the jury trial right preserved by the Seventh Amendment is just that which attached to claims at common law on the date of the amendment's ratification. It creates no right for claims which historically were classified as equitable.[3] Thus, characterization is the key to the present dispute.

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[3] This amendment, probably more than any other in the Bill of Rights, is cast in historical terms. As Judge Friendly of the 2nd Circuit has pointed out "... we must turn to history to give it content and meaning ..." *Damsky* v. *Zavatt*, 289 F. 2d 46, 48.

A. All Three Claims Should Be Characterized as "Equitable"

In Respondent's view, all three claims involved in this case are properly regarded as equitable. As to two, indeed, there is apparently no dispute. There is virtually no room for doubt that federal law characterizes as "equitable" both a claim for specific performance of a contract,[4] In re *Canister Co.*, 182 F. 2d 510 (3d Cir. 1950); *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173 (2d Cir. 1945); *Mahon* v. *Bennett*, 81 F. Supp. 901 (W.D. Mo. 1948); Pomeroy, Equity Jurisprudence (5th ed. 1941) § 1400; 5 Moore, Fed. Practice & Procedure 179, and a claim to cancel a written instrument, *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203 (1936); *State Farm Mut. Auto Ins. Co.* v. *Mossey*, 195 F. 2d 56 (7th Cir. 1952); *Johnson* v. *Gardner*, 179 F. 2d 114 (9th Cir. 1949); *Liberty Mutual Ins. Co.* v. *Gerald*, 170 F. 2d 917 (5th Cir. 1948) 5 Moore, Fed. Practice and Procedure 183; *cf.* also *Beacon Theatres* v. *Westover*, 359 U.S. 500, 515 (dissenting opinion). Nor does it alter the characterization of the latter claim if a litigant alleges that the written instrument should be cancelled because it was fraudulently procured. Just such allegations of fraudulent inducement were involved in *American Life Ins. Co.* v. *Stewart*, *Johnson* v. *Gardner* and *State Farm Mut. Auto Ins. Co.* v. *Mossey*, *supra*. *Cf.* also *Enclow* v. *New York Life Ins. Co.*, 293 U.S. 379; 5 Moore 183 *supra* and cases there cited. The Supreme Court itself has even scrutinized an at-

[4] It is conceivable, inasmuch as his was a contingent-fee contract, that Conner's counterclaim could also be characterized as a claim to establish and enforce an attorney's lien on the proceeds of court judgments obtained through his efforts. Viewed in this light, the claim would also be equitable in character under federal law. See *Ingersoll* v. *Coram*, 211 U.S. 335 (1908); *Taylor* v. *Scarborough*, 66 F. 2d (2d Cir. 1933).

torney-client contingent-fee contract for fraud or overreaching, in a case arising on the equity side of the docket before the Federal Rules were promulgated. *Taylor* v. *Bemiss*, 110 U.S. 42 (1884).

The third claim here to be characterized is that with which Simler opened these proceedings, his claim for an adjudication of what constituted a "reasonable fee." During oral argument Mr. Justice Black observed that Simler's original complaint might be likened to an action for debt, hence legal in character. Regardless of the verbal formulation used, Respondent thinks the claim originally asserted was not within the pale of those assured a right of jury trial by the Seventh Amendment. The reason for its exclusion is the strict historical test mentioned above. As explained in the earlier brief, obligations owed from clients to barristers under employment contracts were not justifiable as of 1791 because not judicially enforceable by the barristers. Such litigation as here involved was then, so to speak, affirmatively barred. Simler's opening claim, therefore, is on a par with actions brought against the sovereign. The latter carry with them no right of jury trial, no matter what the form of action involved, because, most precisely put, a litigant had no standing to bring such actions at common law. The line of Supreme Court cases so holding is perfectly analogous here. Simler's original claim was the sort which enjoyed no jury trial right at common law, and cannot be made to do so now except by a deliberate broadening of the area of jury trial protection afforded by the Seventh Amendment.[5]

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[5] In the relatively few instances where the Supreme Court has decided cases collaterally or implicitly touching jury trial questions in attorney-client contractual disputes, *e.g.*, *Stanton* v. *Enebry*, 93

B. Even if the "Reasonable Fee" Claim Was "Legal," the Result Below Was Proper

Assuming *arguendo* that Respondent's analysis of Simler's opening "reasonable fee" claim is rejected, the trial court decision was nevertheless quite proper. If the reasonable fee claim is deemed "legal," then and only then do we encounter any questions posed by *Beacon* and *Dairy Queen*, since the teaching of these decisions is confined to cases where "legal" and "equitable" claims are joined together. But even they do not require an alteration in the result below.

Once this Court subscribed to the view that no violence was done the Seventh Amendment by a complete emulation in federal courts of the prevailing practice in English courts of law and chancery as of 1791. Thus it said, "[w]here an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury . . ." *Liberty Oil Co.* v. *Condon Nat'l Bank*, 260 U.S. 235, 242 (1922), since this had been the historical order of trial. With *Beacon*, however, the rule as to order of trial changed. Alert to the danger of a litigant's loss of his jury trial right, in light of the modern joinder of "legal" and "equitable" claims into a single form of action, the Court held in *Beacon* that where such legal and equitable claims are joined, requiring selection between a jury and non-jury trial of certain common

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U.S. 548 (1877); *Head* v. *Hargrave*, 105 U.S. 45 (1882), the historical argument based upon the non-enforceability of barristers' contracts at English common law has never been mentioned.

The distinction between solicitors and barristers adverted to in Petitioner's oral argument does not overcome Respondent's argument, it should be noted, since in the instant case Respondent was retained to act as a "barrister," not merely a "solicitor."

issues, the trial court's discretion is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. 510

The more recent *Dairy Queen, Inc. v. Wood*, 8 L. ed 2d 44 (1962), though simply an application in a slightly different context of the same *Beacon* doctrine, also made it clear that labels in pleadings cannot control the characterization of litigation for the purpose of applying the doctrine.*

The *Beacon* principle has nothing whatever to do with the instant case. The doctrine, as enunciated in

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* In *Dairy Queen* the plaintiff's complaint alleged breach of a written trademark licensing agreement, followed by plaintiff's cancellation thereof and defendant's continued use of the trademark thereafter. The primary defense asserted to the charge of breach of contract was that the written agreement had been later modified by an oral agreement. Characterizing the original complaint for a money judgment as "wholly legal in its nature," the Court overturned a trial court order striking the defendant's jury demand. It added that the nature of the defense interposed did not transform the "legal" claim into an "equitable" one.

As can readily be seen, *Dairy Queen* has nothing to do with the present questions. It could apply in Simler's favor only if read to mean that the original complaint determines the characterization of a total lawsuit. But this it did not say, otherwise the Court need not even have *considered* the defenses alleged. Even if it were given such a radical interpretation, the fact remains that Simler's original complaint was not, in terms, exclusively confined to a money judgment and Conner's counterclaim prayed expresly for an undivided one-half interest in real property.

Dairy Queen may mean that any given claim for a money judgment is very likely to be characterized as "legal" by the Supreme Court, for the purpose of enforcing Seventh Amendment rights. But this is of no help to Simler's cause here. The most this principle would mean to the instant case is that Simler's original "reasonable fee" claim should be regarded as "legal". It is this premise that Respondent assumes *arguendo* in the textual discussion at pp. 8-10 and, for reasons there noted, it does not require reversal of the trial court's disposition of the issues below.

the two Supreme Court decisions, compels a jury trial of a "legal" claim ahead of an "equitable" one, joined in the same action, only where there are common issues of fact (or mixed fact and law) between the two claims. *See e.g., Thermo Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F. 2d 486 (5th Cir. 1961); *Minnesota Mut. Life Ins. Co. v. Brodish*, 200 F. Supp. 777 (E.D. Pa. 1962). The whole thrust of the doctrine, of course, is to insure that a litigant's right of jury trial on his legal claim is not prejudiced by collateral estoppel, resulting from a prior adjudication of a court-triable "equitable" claim. In our case, however, there are no common issues—either of fact, law or mixed fact and law—between the assertedly "legal" claim, for a determination of a "reasonable fee" and the remaining two equitable claims for specific performance and for cancellation of the September 25 written instrument.

What constitutes a "reasonable fee" under the July letter considered alone would appear to be purely a matter of fact, and a question that has nothing whatever to do with the question of whether the September instrument should be set aside for alleged fraudulent inducement. The claim for specific performance and the claim for cancellation are correlatives, of course, both centering on the September instrument. They represent the opposing sides of the same equitable controversy. Between the outcome of this controversy and the determination of a "reasonable fee" under the language of the July letter there is no overlap in fact or law, nor any danger of collateral estoppel.

It is true, on the other hand, that the "reasonable fee" claim is in a sense contingent upon the outcome of the "cancellation" issue. That is, the need for cal-

culating a "reasonable fee" under the terms of the July agreement alone does not arise unless the September instrument is cancelled—otherwise the liquidated fee schedule, like any other unambiguous attorney-client contract, *cf., Carter* v. *Spanos*, 250 F. 2d 814, 816 (8th Cir. 1958); *Gray* v. *Brunetti Const. Co.*, 266 F. 2d 809 (3d Cir. 1959), will set the fee due Respondent. But there is a vast difference between thus making it unnecessary to raise a litigant's "legal" question and actually answering the question—possible to his prejudice—by a court trial. It is the latter hazard, not the former, that the *Beacon* doctrine has been thought to reach. *Cf., Damsky* v. *Zavatt*, 289 F. 2d 56 (3d Cir. 1959).

Precisely because the "reasonable fee" claim is a contingent one, application of the *Beacon* principle to the instant facts makes no sense at all. Determination of a "reasonable fee" is the only issue Simler ever spelled out in his repeated demands for a jury. Assume that the trial judge had submitted this issue to a jury before deciding the equitable question of cancellation. The jury deliberations would have been altogether idle if the court-triable issue of cancellation had later been decided in Respondent's favor. To avoid the danger of such an idle ceremony the trial court should quite properly be allowed to try the cancellation issue *first*, in a case such as this one. Certainly no right of a litigant in Simler's shoes is thereby lost. Assuming that the "reasonable fee" claim is "legal," he may have it tried to a jury *if* the court-triable issue of cancellation is decided in his favor. In our case the latter issue went the other way—a proper decision whose merits are not here under review. Under these circumstances it is literally impossible that Simler can be said to have been dispossessed of any Seventh

Amendment rights, even on the somewhat gratuitous assumption that his original claim should be characterized as legal.

In short, it should now be demonstrably clear that the trial court's decision below cannot be overturned on the strength of the *Beacon* doctrine. Only by advancing beyond the doctrine and engineering fresh principles can this be accomplished. Respondent is far from caviling with the often desirable judicial engineering of novel rules. But there is no need for such advances here. *Beacon* as written is perfectly sound law—and it should remain as written. To go beyond it would come perilously close to a judicial enlargement of the right of jury trial as historically conceived, thus contravening both the statutory policy expressed in the Federal Rule Making Act, 28 U.S.C. 2072, and the Federal rules themselves. Moreover, there is no good reason or policy to justify such an extension of *Beacon*.

CONCLUSION

For the foregoing reasons Respondent respectfully prays that this Court either affirm the Court of Appeals decision below, or else modify it by holding that entry of summary judgment by the trial court was proper.

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